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EDITOR'S NOTE

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(SHOW) PROCEEDINGS AND ORDERS DATE: 01278

CASE NBR 86-1-00528 CFX
SHORT TITLE Brown, Honour, etc., et al. DOCKETED: Sep 25 1986
VERSUS United States

Date	Proceedings and Orders
Jul 30 1986	Application for extension of time to file petition and order granting same until September 25, 1986 (Brennan, August 5, 1986).
Sep 25 1986	Petition for writ of certiorari filed.
Oct 16 1986	Order extending time to file response to petition until November 24, 1986.
Nov 25 1986	Order further extending time to file response to petition until December 8, 1986.
Dec 8 1986	Brief of respondent United States in opposition filed. VIDED.
Dec 10 1986	DISTRIBUTED. January 9, 1987
Dec 24 1986	Reply brief of petitioners Honour Brown, etc., et al. filed
Jul 30 1986	Application for an extension of time to file a petition for a writ of certiorari filed (A-71), and order
Jul 30 1986	granting same until September 25, 1986 by Brennan, J.,

CONTINUE (

PROCEEDINGS AND ORDERS DATE: 01278

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Jul 30 1986	granting same until September 25, 1986 by Brennan, J., on August 5, 1986.
Jan 12 1987	REDISTRIBUTED. January 16, 1987
Jan 20 1987	Petition DENIED. Dissenting opinion by Justice White with whom Justice Blackmun joins. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

86-528

Supreme Court, U.S.
FILED
SEP 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1986

HONOUR BROWN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF GARY M. BROWN AND AS ADMINISTRATRIX OF THE ESTATE OF GARY M. BROWN; ANGELO J. GARNOS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF WILLIAM R. GARNOS AND AS ADMINISTRATOR OF THE ESTATE OF WILLIAM R. GARNOS; GEORGE M. BERRY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF DAVID L. BERRY, AND AS ADMINISTRATOR OF THE ESTATE OF DAVID L. BERRY,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTION PRESENTED

Did the United States Court of Appeals for the First Circuit err in holding, first, that the United States Government has a non-statutory "discretionary function" immunity from lawsuits brought pursuant to the Suits in Admiralty Act, and second, that the immunity applies even to "resource allocation" decisions at an operational level?

LIST OF ALL PARTIES

All parties to this action appear in the caption of this Petition.

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OCTOBER TERM, 1986

No. -

HONOUR BROWN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF GARY M. BROWN AND AS ADMINISTRATRIX OF THE ESTATE OF GARY M. BROWN; ANGELO J. GARNOS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF WILLIAM R. GARNOS AND AS ADMINISTRATOR OF THE ESTATE OF WILLIAM R. GARNOS; GEORGE M. BERRY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF DAVID L. BERRY, AND AS ADMINISTRATOR OF THE ESTATE OF DAVID L. BERRY,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Opinions Below

The opinion of the United States District Court for the District of Massachusetts with regard to liability is reported at *Brown* v. *United States*, 599 F.Supp. 877 (D. Mass. 1984). The opinion of the United States District Court for the District of

Massachusetts with regard to damages is reported at *Brown* v. *United States*, 615 F.Supp. 391 (D. Mass. 1985). The opinion of the United States Court of Appeals for the First Circuit is reported at *Brown* v. *United States*, 790 F.2d 199 (1st Cir. 1986).

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was entered on May 13, 1986, and a copy thereof is appended to this Petition.* The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

Statute Involved

Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, and particularly Section 742 of that act, which provides in pertinent part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding *in personam* may be brought against the United States or against any corporation mentioned in section 741 of this title.

Statement of the Case

This admiralty action was brought on behalf of three commercial fishermen who drowned at sea during a severe storm on November 21-22, 1980. The fishermen died because they relied upon the United States Government to properly maintain its existing system of weather monitoring equipment, specifically, a weather observation buoy which the govern-

*On August 5, 1986, the time for filing was extended to September 25, 1986.

ment had erected on Georges Bank.[1] The buoy had been malfunctioning for more than six months prior to the incident in which the decedents were killed, and in September of 1980 it stopped transmitting wind speed and direction data altogether. The government was aware of the problem before the fatal incident but did not correct the situation or warn the commercial fishermen of this lack of critical information. The lack of this crucial data resulted in incomplete and grossly inaccurate forecasts in the Georges Bank area where heavy commercial fishing traffic was known by the government to exist. These defects manifested themselves one final time on the night of November 21-22, 1980, when they prevented the timely and accurate forecast of the vicious storm which ended up taking the lives of the three fishermen whose estates are represented herein.

The District Court found that the government "undertook to provide a service that was necessary to the protection of the plaintiffs, and that plaintiffs relied on that service," and that the government therefore owed a duty of reasonable care "in maintaining its weather observation and prediction system." (Pet. App. A-26). The District Court further found that the government breached that duty by failing to repair or maintain the buoy, and that the breach resulted in the deaths of the petitioners' decedents. (Pet. App. A-29).

---

[1] The District Court found that the NWS weather forecasts were heavily relied upon by small commercial fishermen, and that the government was well aware of and encouraged that reliance. The Court stated in part:

> Forecasts that are prepared from buoy data, therefore, are particularly crucial to small vessel fishermen when they make a decision as to whether or not it is safe to venture out to sea. Indeed, one reason for growth of the small vessel lobstering industry during the past several years has been the increased reliability of weather forecasting, thanks to the expanded buoy program...
>
> The NWS knew of and encouraged small vessel fishermen's reliance on their daily forecasts. (Pet. App. A. 20-21).

The Court expressly relied on the expert testimony of William Haggard, the petitioners' meteorological expert, who found that "the NWS forecast was significantly incorrect as of 7 a.m. on November 21, 1980, that a storm warning should have been issued no later than 10:39 p.m. that day, and that the lack of buoy data from Georges Bank was critical to the NWS error." (Pet. App. A-30). The District Court also relied on the testimony of Captain Brown, a survivor of the storm and Captain of the vessel from which one of the decedents was washed overboard, who stated that if a proper storm warning had been issued by 11 p.m. on November 21, he would have turned back.[2] The District Court concluded on this basis that the government's failure to act was a substantial factor in causing the deaths of the three fishermen. (Pet. App. A-30).

With respect to the government's discretionary function defense, the District Court noted that "there is disagreement as to whether the discretionary function exception applies to cases under the Suits in Admiralty Act." (Pet. App. A-31). The District Court stated, however, that it was bound by the pronouncement of the First Circuit in an earlier case to find that the exception could be asserted under the Suits in Admiralty Act (hereinafter referred to as "SIAA"). The District Court, therefore, analyzed the government's course of conduct in light of this Court's decisions in *United States* v. *S.A. Empresa de Viacas Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) and *Dalehite* v. *United States*, 346 U.S. 15 (1953). While the District Court recognized that "[t]he decision to have a weather monitoring and prediction system and the decisions concerning the methods for obtaining observational data may have involved policy judgments," it concluded that "the government action here did not involve a policy judgment." (Pet. App. A-33). "The law does not permit the government,

[2] In fact, Captain Brown testified, according to the court opinion, "that the decision to terminate or continue a particular voyage often hinged on NWS forecasts." (Pet. App. A-26).

under the guise of policy making, to negligently remove its proffered safety net without reasonable notice to those who risk their lives daily in reliance on it." (Pet. App. A-33-34). The District Court, therefore, rejected the discretionary function defense.

On appeal, the United States Court of Appeals for the First Circuit reversed. Although it did not overturn the District Court's findings of fact as to causation and reliance, the Court of Appeals held that the discretionary function was available and that the government's maintenance of its weather observation and prediction system was a discretionary function and was thus immune from tort liability.

Existence of Jurisdiction Below

The United States District Court for the District of Massachusetts had jurisdiction over the tort claims of the petitioners pursuant to the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*

Reasons for Granting the Writ

This case presents two related issues. The circuits are split on both issues. The first is whether a "discretionary function" exemption should be read into the SIAA, which by its terms contains no immunity for discretionary acts. The second issue concerns the meaning of "discretionary function," in particular whether the government's immunity extends to operational decisions about how to allocate resources in providing services to the public.

I. There is no Non-Statutory "Discretionary Function" Exception to Suits Under the SIAA

Petitioners brought this action pursuant to the SIAA, which was first enacted in 1920 for the purpose of waiving sovereign immunity in certain cases involving government vessels and cargo. In 1960, the SIAA was amended, to allow lawsuits

against the United States whenever an admiralty proceeding could have been maintained against a private individual. At the same time, most maritime claims were removed from the coverage of the Federal Tort Claims Act (hereinafter referred to as "FTCA"), 28 U.S.C. 2671, 2680(d).[3] The SIAA, however, incorporated none of the FTCA's exceptions to the governmental waiver of sovereign immunity. As a result, courts have struggled with whether and how to apply these FTCA exceptions in SIAA actions, and have reached differing positions as to the availability of such exceptions.

Chief among these controversial FTCA exceptions is the exception for discretionary functions of government. This exception was expressly included in the FTCA in order to immunize the government from "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C. 2680(a).

Since the SIAA does not contain any language even remotely similar to that found in the FTCA, several jurisdictions have held that the SIAA constitutes a waiver of sovereign immunity in all admiralty cases covered by the statute. The leading case in support of this point of view is *Lane* v. *United States*, 529 F.2d 175, 179 (4th Cir. 1975), which unequivocally holds that the SIAA effectively waives the government's sovereign immunity for all cases covered by the act and contains no discretionary function exception. The Fourth Circuit found no basis "upon which we can import the many exceptions of the Tort Claims Act into the Suits in Admiralty Act." *Id.* This rule was also followed by the Fifth Circuit in *DeBardeleben Marine Corp.* v. *United States*, 451 F.2d 140, 145 (5th Cir. 1971),

[3] Section 2680 of the FTCA provides in part:

> The provisions of this Chapter and Section of this title shall not apply to—
>
> (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

which found that the purpose of the 1960 amendment to the SIAA was to assimilate governmental liability in admiralty to that of the private person and held that to reimport the FTCA exceptions would circumvent this purpose. *DeBardeleben Marine Corp.* v. *United States, supra. See also, McCormick* v. *United States*, 645 F.2d 299 (5th Cir. 1981). The Ninth Circuit in *Nelson* v. *United States*, 639 F.2d 469, 473 (9th Cir. 1980) appraently follows this interpretation; it has held that the SIAA does not itself provide a cause of action, but "merely operates to waive the sovereign immunity of the United States in admiralty suits." *Id.* Although the Ninth Circuit does not expressly speak to the application of the discretionary function, its language with regard to waiver seems to indicate agreement with the Fourth and Fifth Circuits. *Id.*

Other circuits have ruled to the contrary.[4] As the District Court noted, the settled law of the First Circuit is that the SIAA does incorporate the discretionary function exception of the FTCA. *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977). In *Gercey*, the First Circuit, although recognizing that it was taking a contrary position to the only other circuit to rule on the issue at that time, see, *DeBardeleben Marine Corp., supra*, held that denying immunity to governmental policy decisions would result in an "intolerable state of affairs." *Id.* The Seventh Circuit followed, holding that a discretionary function exception is implied in the SIAA. *Bearce* v. *United States*, 614 F.2d 556, 559-60 (7th Cir.), *cert. denied*, 449 U.S. 837, *reh. denied*, 449 U.S. 1026 (1980) (explicitly noting "conflict between the First Circuit and the Fourth and Fifth Circuits"). *See also, Hillier* v. *Southern Towing Co.*, 714 F.2d 714, 722 (7th Cir. 1983). Finally, the District of Columbia Circuit, after examining

[4] The District Court referred to the disagreement among the jurisdictions with regard to this issue, but stated that it "of course, accepts and follows the First Circuit's pronouncement in *Gercey* that the discretionary function exception applies to the Suits in Admiralty Act . . ."(Pet. App. A-31).

both sides of the current debate on the subject, determined that a discretionary function exception must be found to exist within the SIAA. *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1085 (D.C. Cir. 1981).

Commentators have noted the wide and apparently growing split among the circuits and the substantial disparities it produces in litigation against the United States. "Until the Supreme Court addresses the issue, counsel should be aware of the different interpretations of the statute in the various circuits." Farber, *Admiralty Claims Against the United States*, XX Forum 122, 134 (1984). These variations are especially unfortunate in a maritime context. Fishermen setting out from different ports ought not to be subject to different legal rules, nor should those rules vary depending on whether they cross circuit boundaries in pursuit of their livelihood. In this case, the First Circuit accepted the trial court's findings; it reversed solely because of its legal conclusion that the government was engaged in an exempt discretionary activity. Had the same findings been upheld in the Fourth or Fifth Circuits, the verdict would have been affirmed. A conflict of this sort is particularly intolerable when it deals with the duty that the Federal Government owes to its citizens.

II. Resource Allocation at an Operational Level is not a Discretionary Function

Even if the "discretionary function" exception applies to suits under the SIAA, this case raises the difficult question of just what a "discretionary function" is. The definition devised by the First Circuit conflicts directly with the views of at least four other circuits.

The issue that divides the circuits grows out of the principles announced by Justice Frankfurter for this Court in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1956). *Indian Towing* held that the government could be sued for negligent failure

to keep a lighthouse in operation:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act. *Indian Towing Co.* v. *United States*, 350 U.S at 69.

Indian Towing leaves much room for the exercise of governmental discretion in deciding whether to begin or end government services. It requires only that, once the government has begun to provide a service on which the public relies, it must either exercise due care or warn the public that it is not doing so. In addition, the discretionary function has recently been held to immunize the government when acting to regulate the conduct of private individuals. *Varig Airlines*, 467 U.S. at 810 (1984). Again, however, not every act of the government is excepted from liability by the exemption.

The question that has divided the lower courts is whether non-regulatory actions of the government are protected by the exemption even after the basic decision to provide a service has been made. Lawyers for the government have argued that such actions are protected by a sweeping definition of discretion. Even after the government decides to provide a service and knowingly induces reliance on it, they contend, discretion inheres in decisions that allocate more or fewer resources to a particular task and in decisions that set priorities when resources are limited.

This case illustrates the issue. The government argued below that the absence of a functioning weather buoy on Georges Bank was the result of governmental discretion. The government's explanation may be summarized as follows: The malfunctioning buoy was not repaired because the government was planning to replace it; it was not replaced because the Coast Guard had other things to do with its ships and because a lack of funds meant the Coast Guard did not have a substitute buoy on hand. See Appellant's Br. at 41-42.

In the government's view, then, it exercises a discretionary function when it sets priorities so as to carry out operations with limited resources. In *Chute* v. *United States*, 610 F.2d 7 (1st Cir. 1979), the First Circuit upheld this view, and it reaffirmed its position in this case, expressing discomfort at the prospect of courts deciding that more resources should be devoted to particular governmental activities:

"Courts have neither the expertise, the information, nor the authority to allocate the finite resources available to the Secretary among competing prorities." [quoting *Chute*], 610 F.2d at 12. Similarly in our earlier case of *United States* v. *Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195 (1st Cir. 1967), where we held the government liable for negligent performance by the Coast Guard of a rescue operation after it had undertaken it, we stated, after noting that the only rescue vessel available had an inoperable radio direction finder, a seriously defective fathometer, an error in its gyro compass, and an inaccurate and unreliable loran. "How much equipment the Coast Guard is to possess, and how much money it is to spend, measured, necessarily, by Congressional appropriations, must be for the government's uncontrolled discretion." (Pet. App. A-6-7).

As the First Circuit acknowledged, "the Second Circuit has disagreed with" *Chute*. (Pet. App. A-7). See *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985). The First Circuit concluded, however, that the *Eklof* court had "misunderstood" *Indian Towing*. (Pet. App. A-7). It then examined the decision of the trial court, and concluded that "the District Court basically followed the *Eklof* reasoning," and reversed. (Pet. App. A-7).

The Second Circuit has not read *Indian Towing* to authorize the division and subdivision of governmental discretion to create a tort immunity for such operational policies and decisions as when and whether to replace or repair a buoy or how many buoys to deploy. In *Eklof*, the Second Circuit permitted a suit against the government to go forward on the theory that the Coast Guard should have deployed extra buoys to mark a maritime hazard. The court was not deterred by the claim that this constituted judicial interference in the affairs of other branches:

> When the Coast Guard acted to mark the obstruction, it was required to do whatever was reasonably necessary, including deploying additional buoys, to mark it adequately.
>
> We do not share the *Chute* court's concern that allowing such actions to proceed to judgment will result in improper judicial interference with the allocation of finite resources.

762 F.2d at 204.

As *Chute*, *Eklof* and this case show, the proper maintenance and deployment of buoys has been the source of much litigation against the government. See also, *Drake Towing Co.* v. *Meisner Marine Construction Co.*, 765 F.2d 1060 (11th Cir. 1985) (government's improper placement of buoy not exempt from suit); *Olympia Sauna Compania Naviera S.A.* v. *United States*, 604 F.Supp. 1297, 1302 n.15 (D. Ore. 1984) (collecting

cases). The fact that the conflict in the circuits is most pointed and direct in such cases should not camouflage the scope of the issue. In fact, the conflict appears in non-maritime cases as well.

The Eighth Circuit, for example, has refused to treat the government's placement of power lines as a discretionary function. *Aslakson* v. *United States*, 790 F.2d 688 (8th Cir. 1986). It did so even though the government had weighed "several long term solutions" to the problem of power lines overhanging a lake and had established priorities consistent with its resources, elevating lines over the main part of the lake but not elevating those that the responsible official did not consider a hazard. *Id.* at 690. The Eighth Circuit held that "[o]perational mismanagement in the maintenance of electrical transmission lines does not fall within the scope of the discretionary function exemption." *Id.* at 693. *Accord*, *Henderson* v. *United States*, 784 F.2d 942, 943 n.2 (9th Cir. 1986) ("The exception applies only to decisions made at the planning stages. Here, the missile facility safety decisions were operational in nature, and, therefore, the exception is inapplicable.")

The courts that follow the Second and Eighth Circuits' narrower view of discretion do not open every official decision to judicial second-guessing. Instead, they focus on the *kind* of decision at issue. Operational questions such as allocating manpower and other resources, or setting priorities are not protected; public policy decisions are protected. As the *Aslakson* court declared, a tort immunity is not conferred whenever "some degree of judgment" is exercised, even if it is "the kind of judgment that requires the knowledge and professional expertise of government employees who implement government policies." 790 F.2d at 693. Instead, the judgment must involve "the weighing of public policy considerations." *Id.* *See also*, *Begay* v. *United States*, 768 F.2d 1059, 1064 (9th Cir. 1985) ("[T]he exception applies when the agency makes a decision that is grounded in social, economic and political

policy."); *Chotin Transportation, Inc.* v. *United States*, 784 F.2d 206, 211 (6th Cir. 1986) (discretionary function limited to decisions grounded in "social, economic and political policy"). Indeed, in a lengthy post-*Varig* analysis, the Eleventh Circuit has concluded that even design decisions may be non-discretionary as long as they do not implicate social, economic or political policies. *Alabama Electric Cooperative, Inc.* v. *United States*, 769 F.2d 1523 (11th Cir. 1985).

The position of the First Circuit, in contrast, immunizes the government from liability for all but the most ministerial acts. "Resource allocation" and "priority setting" occur at every level in government. When a bald tire on a government-owned truck blows out and causes an accident, the government should not escape liability because the General Services Administration has limited funds or because it has a policy of replacing tires only after 50,000 miles. The logic of the position urged by the government and adopted by the First Circuit would eviscerate *Indian Towing* itself, for the government could no doubt argue in future cases that more frequent or exhaustive inspections of lighthouses would have diverted resources from other governmental priorities. Private parties too have limited funds and must adopt priorities in using them. For private and public defendants alike, such policies should be given weight in court, but only as part of a broader inquiry into whether the defendant acted reasonably in the circumstances, that is, whether it was negligent.

In short, it is common ground that government officials must make choices that reconcile their mission with the resources available to them. The issue that divides the circuits—and the one that deserves an answer from this Court—is whether the need to make such choices confers a total immunity on the government or is simply part of the inquiry into what is reasonable in the circumstances.

Conclusion

The two related questions raised by this petition have seriously divided the federal circuits. On these facts the Second, Fourth, Fifth, Eighth and Ninth Circuits would have denied the availability of a discretionary function defense. A contrary result was reached by the circuit below, and might well have been realized in other circuits and in scattered district courts around the nation. Such confusion over a threshold issue—the availability and application of the discretionary function exemption—has no place in a federal system.

For all the reasons set forth above, a Writ of Certiorari should be issued to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 85-1790.*

HONOUR BROWN, et al.,
PLAINTIFFS, APPELLEES,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLANT.

ARGUED FEB. 3, 1986.
DECIDED MAY 13, 1986.

Robert L. Willmore, Deputy Asst. Atty. Gen., with whom *Richard K. Willard*, Asst. Atty. Gen., *William F. Weld*, U.S. Atty., and *David V. Hutchinson*, Asst. Director, Admiralty, Torts Branch, Civ. Div., U.S. Dept. of Justice, were on brief, for defendant, appellant.

Michael B. Latti, with whom *William J. Griset, Jr.* and *Latti Associates* were on brief, for plaintiff, appellee Brown.

Before
BOWNES and ALDRICH, *Circuit Judges*, and
PETTINE,** *Senior District Judge*.

* The companion appeal, No. 85-1805, from the court's dismissal of a claim by *F/V Sea Fever* for indemnification and contribution from the United States, in which *Dexter L. Kenfield* with whom *Andrew F. Lane*, *Gaston Snow & Ely Bartlett* and *Glynn & Dempsey, P.C.* were on brief, is mooted by our decision in the principal case.

** Of the District of Rhode Island, sitting by designation.

BAILEY ALDRICH, Senior Circuit Judge.

Friday noon, November 21, 1980, the F/V SEA FEVER and the F/V FAIRWIND set out from their home port of Hyannis, Massachusetts, for the southeastern edge of Georges Bank to engage in lobster fishing. Before leaving, they listened, as was their custom, on their radio receivers, to the National Weather Service (NWS) marine weather predictions. On VHF and sideband radios there can be received regularly, at 5:00 a.m., 11:00 a.m., 5:00 p.m. and 11:00 p.m., reports prepared by NWS as of 21 minutes before, with duplicate broadcasts 20 minutes later. The Friday 11:00 a.m. broadcast predicted good weather, as did those at 5:00 and 11:00 p.m. thereafter. Early Saturday morning the vessels arrived at the fishing grounds. The 5:00 a.m. report carried a gale warning, predicting northwest winds, 30 to 40 knots for the area, diminishing by night, with seas 6 to 12 feet, subsiding at night. In point of fact, the vessels were already experiencing such winds, and even greater seas. This was too much weather, but because of the wind's direction, it was impossible to turn back.

> The 10:39 a.m. report, broadcast at 11:00 and 11:20, read, Storm warning in effect at 10 AM EST...northwest winds 40 to 50 knots overnight....Seas 15 to 25 rest of today subsiding tonight.

Again, the storm was already even greater than the forecast. The SEA FEVER was experiencing winds in excess of 70 knots, with seas running between 30 and 40 feet in height. This was a storm known, because of its sudden and explosive development, as a "bomb." At about this time the FAIRWIND pitchpoled and sank. Three of her crew were lost; the one other ultimately being rescued in a liferaft. In addition, one of the SEA FEVER's crew was swept overboard.

Based on a finding of negligence in not earlier predicting the storm's true path, the district court, following a bench trial pursuant to the Suits in Admiralty Act, 46 U.S.C. §§ 741

et seq.,[1] awarded damages to plaintiff representatives of the deceased fishermen. *Brown* v. *United States*, 599 F.Supp. 877 (D. Mass. 1984); S.C. 615 F.Supp. 391 (D. Mass. 1985). On this appeal the government denies liability as a matter of law, and as a matter of fact. Plaintiffs' claims in both respects are based upon the government's failure to have repaired or replaced a sporadically malfunctioning weather-reporting buoy on Georges Bank. Put summarily, the government's position is that it owed no actionable duty, but, if it did, that it had acted reasonably, and that causation was lacking, viz., that the court's findings with respect to the buoy's contribution to the failure to predict were clearly erroneous.

First, the facts.[2] The government maintains a National Meteorological Center (NMC) near Washington, D.C., which processes weather information received from all over, including from weather buoys that transmit via satellite. It reports its computer-prepared data to the various NWS offices, which use it in preparing their forecasts. The Georges Bank buoy's station, known as 44003, is not always occupied by the same buoy. At the times here relevant the buoy was number 6N12. This buoy was scheduled to be replaced by an improved type. In the meantine, on August 11, 1980 it was discovered that it had been damaged, apparently by a passing ship. Limited repairs were made, leaving the buoy functioning in all respects, but on September 9 it was found that the wind speed and direction data was sometimes erratic, known as "spiking." Because it could not be sure when this was happening, NMC continued to log its wind data, but ceased transmitting it to the NWS offices.

The government Data Buoy Center (NDBC) had planned an early replacement of buoy 6N12 with buoy 6N3, after

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[1] Concededly liability corresponds with the Federal Tort Claims Act. *Gercey* v. *United States*, 540 F.2d 536 (1st Cir. 1976), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1599, 51 L.Ed.2d 804.

[2] Many more facts are contained in the district court's 1984 opinion, 599 F.Supp. 877, ante.

bringing 6N3 ashore and installing the new reporting system, but 6N3 went adrift, and though ultimately recovered, it was not expected to be ready until January. In the interim, because of 6N12's erratic performance, NDBC thought to deploy 6N9, which was itself about to be replaced, as a temporary substitute. However, 6N9, too, went adrift and was permanently lost. Further temporary repairs to 6N12 itself were not attempted. The court found this to have been unreasonable. The government disputes this, but for present purposes we will assume in plaintiffs' favor that if, as a matter of tort law, the government owed a duty of care, the finding was warranted.[3]

As to causation, plaintiffs' expert, whom the court credited, testified that an important component in predicting the future weather at Georges Bank would be an accurate report of what was the weather there at the moment, and that if NMC had received correct reports from station 44003 NWS should have forecast the storm in time for the SEA FEVER and FAIR-WIND to escape by returning to port. The government's causation position is that, although its data was not used, 6N12 was not spiking at that time, and that plaintiffs' expert's factual assumptions to the contrary were unsupported, and hence his entire opinion was disproven. Rather than pursue the always difficult questions of clearly erroneous, because the court's finding or, more precisely, its ruling as to a government duty could have very significant repercussions, we will deal with that first.

Ever since enactment of the Federal Tort Claims Act, the area of government acceptance of liability on account of government functions has presented difficult questions. One line of demarcation is rejection if the undertaking was "discre-

[3] We have examined the record and, in fairness to the Weather Service, it is not certain that this finding is supportable. Clearly, a finding the other way would have been justified.

tionary." 28 U.S.C. § 2680(a).[4] Thus, when the government has discretion whether to issue a license to vessels carrying passengers for hire, it cannot be held liable for an alleged unjustifiable refusal. *Coastwise Packet Co.* v. *United States*, 398 F.2d 77 (1st Cir. 1968), *cert. denied*, 393 U.S. 937, 89 S.Ct. 300, 21 L.Ed.2d 274. However, the test is not that simple. In the leading case of *Indian Towing Co.* v. *United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), the government negligently failed to maintain a lighthouse whose presence was advertised in the official Light List. The Court agreed with the government that the decision whether or not to provide the lighthouse was, in the first instance, a discretionary matter, and that there was no duty to do so. However, once it had done so, and had "engendered reliance on the guidance afforded by the light, the government was obligated to use due care. . . ." 350 U.S. at 69, 76 S.Ct. at 125. Two principles are thus involved: the government's free right to engage, or not, in discretionary functions, but with a cut-off where by its conduct, it has induced justified reliance on its adequate performance. The important word is "justified."

As to the first, the government not only has discretion whether or not to engage, but discretion to determine the extent to which it will do so. Thus, in *Chute* v. *United States*, 610 F.2d 7 (1st Cir. 1978), *cert. denied*, 446 U.S. 936, 100 S.Ct. 2155, 64 L.Ed.2d 789, the government marked a sunken wreck with a buoy that protruded only 3½ feet above water. Plaintiff's vessel operator failed to see the buoy, and struck the wreck. The district court adopted the testimony—which we did not dispute—that a 15 foot day marker would have been "more effective." It further found that the 3½ foot buoy was inadequate, and that the Coast Guard having recognized a

[4] "(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved was abused, [is not consented to.]"

need of marking the wreck, this was improper performance, and we held for the plaintiff. In reversing, we discussed at length the teaching of *Indian Towing*.

> In that case damage was sustained when a lighthouse light operated by the Coast Guard was negligently allowed to go out. The Supreme Court stated that while the Coast Guard need not have undertaken the lighthouse service, once it had exercised its discretion to operate the light and engendered reliance on the guidance afforded thereby, it was obligated to use due care to make certain the light was kept in good working order.... [L]iability was not imposed in that case because a more powerful light or taller lighthouse would have been a better warning of the rocks marked by the lighthouse, but rather because the negligent non-functioning of the charted [viz., advertized] lighthouse misled plaintiff to his detriment. 610 F.2d at 13-14.

We accordingly held that, even if a 3½ foot buoy could be found inadequate had the government assumed a duty of due care, it was for the government to decide on the extent of care it wished to undertake.

The rationale of *Chute* was that although the Coast Guard is known to have undertaken marking dangers to navigation, the extent to which it will do so is a discretionary function. There can be no justified reliance upon, or expectation of, any particular degree of performance; something more is needed to establish liability. "[T]here are various degrees of protection. Courts have neither the expertise, the information, nor the authority to allocate the finite resources available to the Secretary among competing priorities." 610 F.2d at 12. Similarly, in our earlier case of *United States* v. *Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195 (1st Cir. 1967), where we held the government liable for negligent performance by the Coast Guard of a rescue operation after it had

undertaken it, we stated, after noting that the only rescue vessel available had an inoperable radio direction finder, a seriously defective fathometer, an error in its gyro compass, and an inaccurate and unreliable loran, "How much equipment the Coast Guard is to possess, and how much money it is to spend, measured, necessarily, by Congressional appropriations, must be for the government's uncontrolled discretion."

We note, in passing, that in *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985), the Second Circuit has disagreed with *Chute*, holding that although, concededly, there was no duty to mark the danger at all, by setting a buoy the Coast Guard had accepted a duty, and was thus obligated to perform it fully, even, if necessary, to the point of setting two or three buoys. With respect, for reasons we develop herein, we believe the court misunderstood the rationale of *Indian Towing* on which it relied.[5]

In the present case, the district court basically followed the *Eklof* reasoning. The very offering of weather service of itself accepted liability and destroyed the government's exemption from suit. "[O]nce a system was in place and mariners began to rely on it the time for policy judgments was past." 599 F.Supp. at 889. Put simply, the court's approach was this. The government established the service for the benefit, inter alia, of fishermen; fishermen relied upon it; the government knew they would rely on it; therefore the government induced reliance; having induced reliance, it became obligated to use due care.

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[5] We believe, too, that the court failed to consider the pernicious consequences that could flow from its approach. With necessarily limited funds, and unable to afford three buoys, will a Coast Guard official place one and risk heavy damages ($382,000 in *Eklof*), or place none at all and play it safe—from the government's standpoint? *Eklof* cuts to the heart of governmental discretion, and, in effect, could deprive navigators of half a loaf, usually thought better than none.

At first blush this perhaps seems plausible. The difficulty is, it proves too much. Every service that the government offers is presumably intended to benefit some class or classes of persons; ergo the government induced reliance; ergo the government owed a duty of due care. On this basis, the only parties to whom the discretionary exception would apply would be who? Non-users? The court has read the discretionary function exception right out by finding it does not apply at precisely the place to which it is particularly directed.

In anlayzing this we note first that, unlike *Indian Towing*, the government here did not make an affirmative misstatement of fact, viz., that an operating buoy was currently providing wind data from location 44003.[8] Although some weather broadcasts did, at least on occasion, report individual station findings, station 44003 wind data had not been released by NMC since September 9, 1980, a fact not contradicted. Plaintiffs' complaint is, rather, that the government's weather predictions were not up to an adequate standard because the forecasters lacked that particular information. Our question is whether the government, by issuing reports, assumed a duty to invest in that activity whatever resources a court might find necessary in order to achieve what it believed to be proper care.

Although we think what we have already said indicates the answer to be no, we will pursue the matter further, To begin with, while, as we have already stated, we are dealing here with a tangible object, a particular supplier of information that goes into the mix, and while we accept the court's finding that this would be information of importance, the representation was not the buoy, but the prediction. Hence the principle involved is not limited to finding unreasonable the failure to maintain a particular supplier, but is universal, and would apply to anything judicially found unreasonably to impair the

[8] Cf. *De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140 (5th Cir. 1971) (failure of government chart to show sunken pipeline; dictum).

quality of the prediction. An expert might testify, and a court accept, that to prepare a fully adequate weather report would call for still additional buoys, or for more advanced computers, or for more operators. Or it might find malfeasance in the processing. All of these are matters which Congress reserved, both to itself in respect to appropriations, and to the agencies' conduct, by the discretionary exception from the F.T.C.A.'s consent to suit. A compilation of early examples of discretionary functions may be found in *Dalehite* v. *United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). See also, *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984), hereafter *Varig Airlines; Shuman* v. *United States*, 765 F.2d 283 (1st Cir. 1985). Without question, a weather service constitutes such, and to say that the very exercise of the function justifies reliance and a right to expect complete care would make the discretionary exception self-destructive.

Although we did not so express it in *Chute*, the proper dividing line between liability and nonliability in such cases has been well stated in the recent case of *Wysinger* v. *United States*, 784 F.2d 1252, 1253 (5th Cir. 1986). "In these cases [imposing liability] the government created the danger after the critical discretionary decision had been made." In *Indian Towing*, the government created a danger by representing that an operating lighthouse was present. In *Varig Airlines*, ante, the government did not create the defective airplane; by merely making only spot checks it did not supply a fully efficient inspection service. For this it was not liable. So, in the case at bar, the government did not create the weather; it merely failed, in the court's opinion, to render adequate performance. In both cases this was a discretionary undertaking. The court failed to respect the statutory provision, n.4, ante, "whether or not the discretion involved was abused."

Nor does it advance matters to say, as did the district court, perhaps aware of the consequences of a broader ruling, that the "duty . . . is . . . limited . . . to an identifiable group of mariners that place special reliance on the accuracy of the NWS weather forecast." 599 F.Supp. at 885. This was wrong in principle, and wrong in the particular. To take the latter first, we might judicially notice that VHF marine forecasts, in addition to local geographical designations, are divided into zones: "Up to 25 miles offshore," "Georges Bank, Northeast Channel & Great South Channel," and beyond, sometimes described as "Up to 1,000 fathoms." "Small craft advisories" are given when particular caution is indicated. Quite part from these details, a cursory look at yacht marinas will show that, in summer, far more amateur seafarers are concerned with weather than are professional seamen. Are the former (who, because of lack of skill, might need warnings more?) not expected to rely? Or does the government represent due care for offshore waters, but not for inshore? Surely weather phenomena are not respecters of persons or places.

More important, the court's making an exception is unsupportable in principle. The court based this special treatment upon the legislative history recognizing a need for more accurate service. This proves too much. Presumably a need is found for every government service, or it would not be undertaken in the first place. Need cannot, by implication, amend the plain language of the discretionary exception. Nor can the court's finding that fishermen "had come to rely on the government forecasts." 599 F.Supp. ante, at 885. We are back to the beginning: the fishermen cannot unilaterally impose on the government a liability it expressly disclaimed.

We add that, from the standpoint of the government, the Weather Service is a particularly unfortunate area in which to establish a duty of judicially reviewable due care. A weather forecast is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions,

including the desirable degree of investment of government funds and other resources. Weather predictions fail on frequent occasions. If in only a small proportion parties suffering in consequence succeeeded in producing an expert who could persuade a judge, as here, that the government should have done better, the burden on the fisc would be both unlimited and intolerable. What plaintiffs choose to disregard as a chamber of horrors in Judge Johnson's concurring opinion in *National Manufacturing Co.* v. *United States*, 210 F.2d 263, 280 (8th Cir. 1954), *cert. denied*, 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108, because he was speaking in terms of strict liability, is not to be so dismissed. Rather, as the court said in *Varig Airlines*, ante, 104 S.Ct. at 2768,

> Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.

Finally, plaintiffs contend, and the court found, that the government should have reported in the Notice to Mariners the suspended use of wind data from station 44003. Notice to mariners is a service by which interested parties are informed of current changes believed to be of moment. Loss or abandonment of an important navigational aid would be an example. The short answer to this claim is that the government has a policy not to report the underlying structure or basis of its weather computing system, or of changes therein. Such a policy is a classic discretionary matter not subject to judicial review. *Dalehite* v. *United States*, ante. Though not our affair, we add this seems a highly reasonable choice. For the government to add a service requiring it, with a penalty of judicial assessment (in both senses), to permit public scrutiny of its functioning would open up a whole new field, indeed one in terms excluded by the statute.

Reversed.

PETTINE, Senior District Judge, concurring.

While I concur in the result reached by my brethren, I feel compelled to write separately to clarify my reasons for joining the reversal of the judgment below. The opinion of the district court judge was provocative, well-reasoned, and obviously carefully thought through. I feel constrained for two interrelated reasons, however, to reverse. First, our opinion in *Chute* v. *United States*, 610 F.2d 7 (1st Cir. 1979), *cert. denied*, 446 U.S. 936, 100 S.Ct. 2155, 64 L.Ed.2d 789 (1980) indicated that the discretionary function exception precludes a court from evaluating whether a particular service provided by the government is "effective" or "adequate." We made clear, however, that under the rationale of *Indian Towing Co.* v. *United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), a government entity's discretion is confined by the requirement that once it undertakes to provide a given component of a service and renders reliance on that particular component, it is obligated to exercise due care in making certain that aspect of the service is kept in good working order. 610 F.2d at 13.

This brings me to my second reason. The plaintiffs' reliance in this case, as well stated by my colleagues, was not on an affirmative misstatement of fact, *i.e.*, was not on information provided by the Georges Bank buoy, but rested on the prediction itself, which at any one time is made up of a number of different factors, no one of which is necessarily determinative. If courts are to interfere so as to ensure that the weather service continues to maintain a given level or quality of prediction, which is made up of numerous and varied factors, in effect, courts would be assessing the adequacy of this government service, for who is to say what components are necessary to maintaining the previously set level of prediction. I, therefore, believe this case different from *Indian Towing*.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA 81-168-T (and related cases)

HONOUR BROWN, Individually and as Personal Representative of GARY BROWN and as Administratrix of the Estate of GARY BROWN, et al.,

PLAINTIFFS,

v.

UNITED STATES OF AMERICA,

DEFENDANT.

OPINION

TAURO, D.J. December 21, 1984

On November 21, 1980, the fishing vessels SEA FEVER and FAIRWIND left the port of Hyannis, Massachusetts for the fishing grounds near Georges Bank. The next day, several crew members were lost during a vicious storm that hit Georges Bank. In this action, plaintiffs[1] contend that the National Oceanic and Atmospheric Administration ("NOAA") negligently failed to maintain a weather observation buoy on Georges Bank whose data were equipped with sophisticated nautical equipment, including VHF radios, radar, Loran position finders, depth sounders and single sideband radios. This equipment, coupled with information provided by the National Weather Service (NWS), made it possible for vessels their size

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[1] Plaintiffs are the personal representatives of the estates of three deceased fishermen (Gary Brown, William Garnos, David Berry) who lost their lives during the storm. Plaintiffs, Garnos and Berry have separate suits pending before Judge McNaught against the owner of the FAIRWIND, Fairwind, Inc. Sea Feaver Corporation, a defendant/third party plaintiff, seeks indemnity and contribution from the government.

to fish 100 miles off shore in that portion of the Continental shelf know as Georges Bank.

Captain Brown testified that it is industry custom for fishermen to use the VHF and sideband radios to monitor the forecasts of the NWS as well as the Notices to Mariners which provide navigational information and special weather warnings. Within fifty miles offshore, fishermen monitor the continuously broadcast VHF forecast. Beyond that range, they monitor the forecasts issued every six hours on the sideband radio. Two stations broadcast the forecasts—a six megacycle band from Portsmouth, Virginia and a two megacycle band, twenty minutes later, from Boston, Massachusetts. Customarily, the fishermen listen to the 5:00 a.m., 11:00 a.m., 5:00 p.m. and 11:00 p.m. NWS broadcasts out of Portsmouth, and the 5:20 a.m., 11:20 a.m., 5:20 p.m. and 11:20 p.m. broadcasts from Boston.

GEORGES BANK WEST TO LONGITUDE 72. SOUTHEASTERLY WINDS 15 TO 25 KNOTS THIS AFTERNOON. SHIFTING TO THE NORTHWEST 20 TO 30 KNOTS TONIGHT. WESTERLY WINDS 10 TO 20 KNOTS SATURDAY. SHOWERS THIS EVENING AND TONIGHT WITH VISIBILITY LOCALLY UNDER 1 MILE. SEAS BUILDING TO 5 TO 10 FEET BY TONIGHT.

SOUTH OF NOVA SCOTIA...

A MARINE WARNING MAY BE NEEDED FOR TONIGHT AND SATURDAY...

SOUTHWESTERLY WINDS 15 TO 25 KNOTS THIS AFTERNOON. WINDS SHIFTING TO THE NORTH AT 25 TO 35 KNOTS TONIGHT POSSIBLY HIGHER SATURDAY. SHOWERS OR FLURRIES TONIGHT. OCCASIONAL SNOW NORTH AND RAIN SOUTH SATURDAY WITH VISIBILITY LOCALLY UNDER 1 MILE. SEAS 3 TO 6 FEET TODAY BUILDING TO 6 TO 12 FEET TONIGHT.

Relying on this encouraging forecast, the vessels left port and headed towards the Great Round Shoal Channel which led to open sea. They arrived at the Great Round Shoal buoy at about 5:00 p.m. on November 21st. There, Captain Brown heard the following forecast:

MARINE FORECAST FOR THE OFFSHORE WATERS EAST OF NEW ENGLAND NORTH OF 40 DEGREES LATITUDE AND WEST OF 60 DEGREES LONGITUDE. LOW CENTER ABOUT 125 MILES EAST OF HATTERAS NORTH CAROLINA EARLY THIS AFTERNOON.THE LOW WILL MOVE NORTHEASTWARD AT ABOUT 30 KNOTS AND INTENSIFY AS IT PASSES ACROSS THE WATERS SOUTH OF NOVA SCOTIA SATURDAY MORNING. A RIDGE OF HIGH PRESSURE MOVING EASTWARD ACROSS NEW ENGLAND PASSING OFF THE COAST SATURDAY EVENING.

GEORGES BANK WEST TO LONGITUDE 72. WINDS SOUTHEASTERLY 10 TO 20 KNOTS SHIFTING TO THE NORTHWEST 20 TO 30 KNOTS OVERNIGHT. NORTHWESTERLY WINDS 15 TO 25 KNOTS SATURDAY SHIFTING TO THE SOUTWEST SATURDAY NIGHT. RAIN AND FOG LOWERING VISIBILITY TO LESS THAN 1 MILE TONIGHT. SEAS 3 TO 6 FEET TONIGHT AND 5 TO 10 FEET SATURDAY.

After receiving this fair weather forecast, the vessels proceeded to Georges Bank. When they arrived there at approximately 11:00 p.m., the weather began to change for the worse, suddenly and without warning. But, the 10:39 p.m. forecast continued to predict good fishing weather.

10:39 p.m. Friday, November 21, 1980

GEORGES BANK WEST TO LONGITUDE 72. WINDS SOUTHEASTERLY 20 TO 30 KNOTS AND GUSTY SHIFTING TO THE NORTHWEST OVERNIGHT. NORTHWESTERLY WINDS 15 TO 25 KNOTS SATURDAY SHIFTING TO THE SOUTHWEST SATURDAY NIGHT. RAIN AND FOG LOWERING VISIBILITY TO LESS THAN 1 MILE TONIGHT IMPROVING TO OVER 5 MILES SATURDAY. SEAS 5 TO 10 FEET TONIGHT AND SATURDAY.

The first forecast of inclement weather came the next morning, November 22, 1980, at 4:39 a.m. That forecast was as follows:

4:39 a.m. Saturday, November 22, 1980

MARINE FORECAST FOR THE OFFSHORE WATERS EAST OF NEW ENGLAND NORTH OF 40 DEGREES LATITUDE AND WEST OF 60 DEGREES LONGITUDE.
INTENSIFYING GALE CENTER ABOUT 200 MILES SOUTHEAST OF CAPE COD WILL MOVE NORTHEAST PASSING JUST SOUTH OF SABLE ISLAND THIS EVENING AND BEYOND THE OFFSHORE WATERS LATER TONIGHT. HIGH PRESSURE WILL BUILD EASTWARD ACROSS THE WATERS SUNDAY.

GULF OF MAINE...
GALE WARNING IN EFFECT FOR EAST PORTION...

NORTHWEST WINDS 15 TO 25 KNOTS WEST PORTION AND EAST 25 TO 40 KNOTS EAST PORTION SHIFTING TO THE NORTHWEST 30 TO 40 KNOTS THIS MORNING. NORTHWEST WINDS 20 TO 30 KNOTS THIS AFTERNOON EXCEPT UP TO 40 KNOTS EAST PORTION. DIMINISHING WINDS TO-

NIGHT BECOMING SOUTHWEST AROUND 15 KNOTS SUNDAY. RAIN AND FOG WITH VISIBILITIES LOCALLY NEAR ZERO EAST PORTION ENDING LATE TODAY. SEAS 6 TO 12 FEET TODAY SUBSIDING SLOWLY TONIGHT.

After hearing that report, an on duty crewman awakened Captain Brown. Captain Brown's on-site observations were that the winds were already at gale force with heavy rain and seas reaching to 25 feet. Captain Brown decided that any attempt to turn back would be futile, because the intense gale wind was coming from the direction in which the vessel would have headed home. Instead, the vessel headed into the wind, trying to maintain its position and stability.

Later that morning, at 11:20 a.m., a forecast originating from the Boston NWS office, called for winds of 40 to 50 knots and seas 15 to 25 feet.

10:39 a.m. Saturday, November 22, 1980

MARINE FORECAST FOR THE OFFSHORE WATERS EAST OF NEW ENGLAND NORTH OF 40 DEGREES LATITUDE AND WEST OF 60 DEGREES LONGITUDE.
A STORM CENTER ABOUT 200 MILES SOUTH OF HALIFAX NOVA SCOTIA EARLY THIS MORNING WILL MOVE EASTWARD AT 25 KNOTS TO A POSITION ABOUT 150 MILES SOUTH OF SABLE ISLAND EARLY TONIGHT. HIGH PRESSURE WILL BUILD EASTWARD ACROSS THE WATERS SUNDAY.

GULF OF MAINE...

STORM WARNING IN EFFECT AT 10 AM EST...

NORTHWEST WINDS 40 TO 50 KNOTS DIMINISHING TO 20 TO 30 KNOTS OVERNIGHT AND TO WESTERLY AT 15 TO 25 KNOTS SUNDAY. RAIN AND FOG WITH VISIBILITIES MAINLY 1 TO 3 MILES BUT LOCALLY NEAR ZERO—GRADUALLY

ENDING FROM WEST TO EAST EARLY TONIGHT SEAS 15 TO 25 FEET REST OF TODAY SUBSIDING SLOWLY TONIGHT.

GEORGES BANK WEST LONGITUDE 72...

STORM WARNING IN EFFECT AT 10 AM EST...

NORTHWEST WINDS 40 TO 50 KNOTS GRADUALLY DIMINISHING TO 20 TO 30 KNOTS OVERNIGHT AND TO WESTERLY AT 20 TO 25 KNOTS SUNDAY. RAIN AND FOG WITH VISIBILITIES 1 TO 3 MILES BUT LOCALLY NEAR ZERO EAST PORTION ENDING BY LATE AFTERNOON. SEAS 15 TO 25 REST OF TODAY SUBSIDING TONIGHT.

Captain Brown's on the spot observation at 11:00 a.m. was that the winds had already reached 70 to 80 knots and that the seas had crested to levels between 30 and 50 feet.

Meanwhile, the FAIRWIND was having comparable problems. It had turned around and was attempting to ride out the storm when it caught a wave and capsized and sank. Crewman Hazard was thrown overboard. After almost a two day struggle on a life raft, Hazard was rescued by the Coast Guard. The other three FAIRWIND crewmen were lost.

The SEA FEVER suffered substantial damage, but did not sink. Tragically, however, crewman Gary Brown was hurled overboard to his death in seas that had reached sixty feet, with winds of approximately 70 knots.

II

THE DEFENDANT'S WEATHER DATA BUOY PROGRAM

The National Data Buoy Program is administered by the National Oceanic and Atmospheric Administration (NOAA), an agency of the Department of Commerce. NOAA oversees the placement and operation of buoys that are moored at various points along the United States coastline. The NOAA Data

Buoy Center (NDBC) supervises the maintenance and repair performed on the buoys by contractors awarded the job after public bid. The NDBC also contracts with the Coast Guard for ship support necessary to place and service the buoys. The NDBC and the Department of Commerce compile the statistical information that serves as the basis for the buoy maintenance and repair program. For the period April 16, 1980 through March 31, 1981, the maintenance and repair program was awarded to Computer Science Corporation (CSC).

The NDBC monitors the data transmitted by the buoys. It has the responsibility for coordinating a schedule of necessary repairs with CSC and the Coast Guard. The purpose of its monitoring program is to insure prompt maintenance and repair of defective buoys so that incorrect data is not transmitted to the NWS.

Three of the data buoys in the program were located along the Northeast coast. Station 44003 was on Georges Bank. Station 44005 was in the Gulf of Maine. Station 44004, called the Ship Hotel buoy, was located south of the Georges Bank buoy. The information from these buoys was intended to be used by the NWS for offshore forecasts, scheduled daily at 4:39 a.m. and p.m. and at 10:39 a.m. and p.m.

The Ship Hotel buoy had been redeployed in November 1980. The Gulf of Maine buoy was scheduled to be redeployed in November 1980 after having been off station for about six months. It was not on station, however, during the relevant days of November 1980.

The Georges Bank buoy, on station since March 1977, ceased reporting wind speed and direction in May 1980, a condition that persisted for most of the summer. Its problems were compounded in August 1980, after it was apparently struck by a passing vessel. On station repairs were made to its hull and electronic report system on August 11, 1980, but the entire wind sensor system failed on September 6, 1980. The NDBC knew of this failure but made no further attempts to repair the

buoy, nor did the NOAA explore with its contractor the possibility of whether the sensor system could be repaired. No substitute buoy was deployed. The Georges Bank buoy was permitted to remain on station even though it was essentially inoperative. As a result, the NWS suffered a critical void in its information gathering system.[2]

When it functioned properly, the Georges Bank buoy provided forecasters with a reliable hourly electronic "snapshot" of the weather picture within the buoy's immediate vicinity. Weather data measured by the buoy included wind speed and direction.[3] This data is used in conjunction with computer guidance forecasts to predict weather patterns and to track the course of a storm. And so, the buoy not only provides an accurate report of current weather in its vicinity, but also includes the forecaster an hourly report of weather changes, facilitating the issuance of timely storm warnings for inclusion in a forecast or a Notice to Mariners.

Wind speed and direction are the most important factors considered by meteorologists in formulating and verifying their forecasts. That buoy data is transmitted via satellite to the National Meteorological Center in Washington, D.C. and, within 40 minutes, it is sent on to NWS in Boston.

Forecasters rely on buoy data because it is more accurate than other available surface observations, such as communications from passing ships. Forecasts that are prepared from buoy data, therefore, are particularly crucial to small vessel fishermen when they make a decision as to whether or not it is

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[2] The importance of the Georges Bank Buoy is underscored by the observation on April 2, 1980 of Rodney C. Winslow, Acting Meteorologist in charge of the NWS Boston office:

> [T]his buoy is extremely important to us in New England. It serves as one of the few reliable observation points in an area where a tremendous number of fishing vessels operate daily.... (Ex. 17)

[3] The "snapshot" information transmitted by a properly functioning buoy includes wind speed and direction, sea-level pressure, air temperature, sea surface temperature, and wave height.

safe to venture out to sea. Indeed, one reason for growth of the small vessel lobstering industry during the past several years has been the increased reliability of weather forecasting, thanks to the expanded buoy program, as well as the availability of affordable sophisticated electronic equipment.

The NWS knew of and encouraged small vessel fishermen's reliance on their daily forecasts. Representatives of NWS met with fishermen to encourage daily forecast monitoring. Moreover, buoy location and information were transmitted in the forecasts, indicating an awareness by NWS that such information was of significance to fishermen and would be relied on by them. Small vessel fishermen had faith that the buoy data, and the forecasts based thereon, provided the most accurate and up-to-date "snapshot" of weather conditions at various locations where they intended to fish. Because small vessels are particularly vulnerable to storms, those fishermen regularly monitored relevant forecasts to keep abreast of changing weather en route to a selected fishing ground. Such monitoring enabled the captain to periodically reassess the safety of his venture.

The buoy reports were, at the time of this incident, a critical aspect of the NWS reporting process. In stressing the importance of adequate buoy maintenance, Mr. Winslow observed:

> I cannot overemphasize the importance we place on buoy reports... not only in the daily operational reports... but also in our important verification program... [which] has allowed us to improve forecasts in both the Gulf of Maine and Georges Bank area. TR 2-72.

Notwithstanding Winslow's admonition, and the NWS's awareness of the buoy's importance to a Georges Bank forecast, it was permitted to remain in disrepair for two and one-half months immediately prior to this incident. During that period, the buoy's wind information was so erratic that its transmission was blocked by the NWS. As a consequence, the NWS did not receive any Georges Bank wind information from

what had been its most reliable source. Moreover, the NWS never informed the small vessel fishermen that the forecasts upon which they were relying were prepared without this crucial buoy data.

III

THE FORECAST

Expert testimony concerning the accuracy of the subject forecast was offered by both the plaintiffs and the defendant. William H. Haggard, a consulting meteorologist, appeared for the plaintiff. The defendant's expert was Frederick Sanders, also a meteorologist. Although the court deemed both witnesses qualified to render opinions on a variety of relevant issues, it found the testimony of Mr. Haggard more persuasive. The court, therefore, accepts and adopts his opinion as to the scenario of relevant events and rejects those of Mr. Sanders that may be in conflict.

Mr. Haggard's opinion was that the NWS did not accurately track the fatal November 21, 1980 storm, because it did not have the Georges Bank buoy data as to wind direction and speed. His opinion was that wind speed and direction, in addition to wave height, constitute the most significant data from a buoy. Of those three elements, he regarded wind speed and direction as the most important for the purposes of analysis and prediction. Wave development may lag four to seven hours behind wind development. Haggard regarded such surface data to be crucial in determining the track of a storm. His opinion was that if the NWS had received correct wind speed and direction data from the buoy, its forecasters would have realized that their analysis was "impossible [and]...would have had to relocate the storm to a more proper position, which would have indicated that it was going to go across Georges Bank as it deepened." TR 3-127.

Haggard also opined that, from 7 a.m. on November 21, 1980 up to the point that the vessels and crewmen were in distress, the center of the storm was actually 90 to 150 miles away from where the NWS had placed it. That variance became significant after 7 p.m. on November 21. His conclusion was that, from 7 a.m. on November 21, 1980 to 4 p.m. the next day, the NWS tracking of the storm was significantly incorrect.

Haggard's opinion was that a storm warning should have been issued at 10:39 p.m. on November 21, 1980 and that, if the NWS had the wind speed and direction information from the Georges Bank buoy, a timely forecast could have been issued that would have accurately tracked both the intensity and location of the storm.[4] The court is persuaded by Mr. Haggard's opinions, and therefore, adopts them as findings.

IV

DISCUSSION

A. *Liability*

This action was brought under the Suits in Admiralty Act, which provides in pertinent part:

> In cases where...if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding *in personam* may be brought against the United States....

46 U.S.C. §742 (1982). Federal law governs maritime tort cases. *See DeBardeleben* v. *United States*, 451 F.2d 140, 147

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[4] Mr. Haggard's expert testimony as to what should have been the proper tracking of the subject storm was based on an analysis called *hindcast* as opposed to the more familiar term, *forecast*. Basically, a hindcast is a reconstruction of weather maps based on an analysis of relevant weather data, weather maps, surface data, Coastal Weather Logs, as well as barometric pressures. The details of Mr. Haggard's analysis, the information he utilized, and the scope of his opinions are set forth fully in the transcript. TR 3-92 to 3-139.

(5th Cir. 1971). As with all tort actions, plaintiffs bear the burden of showing: (1) that defendant owed them a duty of care; (2) that the duty was breached; and (3) that the breach caused plaintiffs harm. *See Allen* v. *United States*, 527 F.Supp. 476, 486 (D. Utah 1981).

1) *Duty*

In analyzing the threshold question of whether the NOAA owed plaintiffs a duty of care, the Second Restatement of Torts provides a useful starting point. Section 323 states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965).

The legislative history leading to the creation of the NOAA demonstrates clearly that the government intended to undertake and meet the responsibility for providing a reliable weather monitoring and prediction system for the use of commercial fishermen.[5] In hearings before the House Committee on Merchant Marine and Fisheries,[6] numerous experts stated

[5] The NOAA was actually created by a Reorganization Plan prepared by President Nixon. *See* Reorg. Plan No. 4 of 1970, 35 Fed. Reg. 15,627 (1970), *reprinted in* 156 U.S.C.A. § 1511 app. at 715 (West 1982). It is widely accepted that this plan was deeply influenced by the report entitled "Our Nation and the Sea" and the hearings thereon. *See* F. Hoole, R. Friedheim, and T. Hennessey, *Making Ocean Policy: The Politics of Government Organization and Management*, 24-25 (1981).

[6] The hearings were actually before the Subcommittee on Oceanography.

that one of the NOAA's principal goals was to improve the system of weather monitoring and prediction, thereby making it possible for fishermen to safely venture even further offshore in their quest for a catch. *See, e.g., A Report by the Commission on Marine Science, Engineering and Resources entitled, "Our Nation and the Sea:" Hearings Before the Subcomm. on Oceanography of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 1st Sess. 13-19 (1969) (testimony of Dr. Julius Stratton) (hereinafter cited as "Hearings").

These Congressional hearings also demonstrate that projects such as the National Data Buoy Development Project[7] were undertaken to improve the accuracy of weather forecasting activities, particularly in areas such as Georges Bank. Dr. Samuel Lawrence stated:

> Most of the weather is made over the water, the west coast weather particularly. [You]. . . need to have some capability to observe what is happening in the Pacific to have a forecast capability. I believe the west coast accuracy is below that of other areas of the country because we don't have the capability on the oceans as we have on land. Similarly on the east—Georges Bank and others.

Id. at 82.

The NOAA, moreover, was on notice that weather forecasts were important to the safety of commercial fishermen and their vessels. After outlining the goals of the NOAA, including the expansion of commercial fishing, Dr. Julius Stratton, a leading proponent of the establishment of the NOAA, stated,

> The development of a system for monitoring and predicting the state of the oceans and the atmosphere is critical to all that the Nation would do in the Seas.

Id. at 16. Obviously, commercial fishermen must have accurate weather information to conduct their activities safely. *Cf. Trade and Transport Inc.* v. *Caribbean Steamship Inc.*, 384

[7] The project was the predecessor of the National Data Buoy Office.

F.Supp. 782 (S.D. Tex. 1974) (mariner negligent because of failure to monitor NWS forecasts).

The testimony of Captain Brown established that fishermen had come to rely on the government's forecasts. He stated that lobstering in non-coastal waters significantly developed after advances in technology made it possible to monitor NWS forecasts far from shore. Moreover, Captain Brown said that the decision to terminate or continue a particular voyage often hinged on NWS forecasts.

Given that defendant undertook to provide a service that was necessary to the protection of plaintiffs, and that plaintiffs relied on that service, this court finds that defendant owed plaintiffs a duty to take reasonable care in maintaining its weather observation and prediction system.

The duty recognized here is a limited one, owed to an identifiable group of mariners that place special reliance on the accuracy of the NWS weather forecast. *DeBardeleben Marine Corp.* v. *United States, supra,* is instructive on this point. There, the Fifth Circuit recognized that the United States owed mariners a duty of care in issuing Coast and Geodetic Survey Charts and weekly Notices to Mariners. *Id.* at 149. In limiting its holding, the *DeBardeleben* court stressed two points: (1) the charts in question were distributed to a narrow audience—mariners—through a reliable channel; and (2) the mariners relied on the charts as accurate. *Id.* at 148.

This court's conclusion that the mariners here were owed a duty of due care by the NOAA is supported by decisions of the Supreme Court, the First Circuit, and other district courts. The seminal case on the issue of *duty* is *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). In *Indian Towing*, a tug with a barge in tow ran aground causing cargo damage. Plaintiff there sued the United States, alleging that the Coast Guard negligently failed to maintain a particular lighthouse. On the issue of what duty, if any, the Coast Guard owed the tug, the Supreme Court stated:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a lighthouse on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.

Id. at 69.[8]

Consistent with the holding in *Indian Towing*, plaintiffs here do not argue that the NOAA had an obligation to provide a weather forecasting system, or that there was a duty to have a data buoy on Georges Bank. Rather, plaintiffs' position is that once NOAA undertook to provide a forecasting system, and then induced reliance on that system, it was obligated to use due care in seeing to the system's proper maintenance or, at least, to give warning that the system was not functioning correctly.

The First Circuit has consistently followed the teaching of *Indian Towing* in analyzing the issue of whether a duty exists. In *Chute* v. *United States*, 610 F.2d 7 (1st Cir. 1979), *cert. denied*, 446 U.S. 936 (1980), the plaintiff alleged that the buoy selected by the Coast Guard to mark a submerged wreck was inadequate. Although the court rejected the plaintiff's claim on the ground that selection of the type of buoy marker was a matter of governmental discretion,[9] it recognized that:

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[8] Recently, the Supreme Court questioned the precedential significance of *Indian Towing* in deciding whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), should be applied to limit government liability. *See United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 52 U.S.L.W. 4833, 4837 (U.S. June 19, 1984). Heeding that admonition, this court does not rely on *Indian Towing* in analyzing the discretionary function exception. *See infra* pt. IV(B)(1). The Supreme Court has never questioned the viability of *Indian Towing* as a precedent with respect to the issue of what *duty* may be owed by the government.

[9] In *Chute* there was no allegation that the buoy selected was negligently maintained.

> The government, just as any private person who undertakes to warn the public of danger and thereby induces reliance, must not worsen the position of those who have come to rely on the service by carelessly omitting it.

Id. at 13.

This language applies directly to the instant case. As noted above, plaintiffs here do not challenge the right of the NOAA to select a particular monitoring system. Rather, plaintiffs' complaint is that the NOAA negligently failed to maintain the selected system after fishermen began to rely on it.[10]

Other district courts confronted with this precise issue have recognized a duty on the part of the government. *See e.g.*, *Chanon* v. *United States*, 350 F. Supp. 1039 (S.D. Tex. 1972), *aff'd*, 480 F.2d 1227 (5th Cir. 1973); *Delroy* v. *United States*, No. 79-546 (S.D. Ind. March 12, 1982). As in the instant case, *Chanon* arose out of the loss of a fishing vessel in a violent storm that the NWS failed to predict. In recognizing that the NWS owed mariners a duty of due care, the *Chanon* court stated:

> Since the government, through the Weather Service, had been, for many years, forecasting the weather and issuing reports and warnings for the general public,... it was under the duty to use due care in gathering weather information, forecasting and making available for broadcasting, up-to-date weather information.

Chanon, 350 F. Supp. at 1041 (citations omitted).

In *Chanon*, the court determined that the United States had not breached its duty. The controlling facts in *Chanon* were

[10] *United States* v. *Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195 (1st Cir. 1967), *cert. denied*, 389 U.S. 836 (1967), also is consistent with *Indian Towing* with respect to the duty issue. There, claimants alleged that their boat was lost because Coast Guard rescue vessels were improperly equipped and negligently operated. The First Circuit held that, where no warning had been given, the government had an obligation to assure that the Coast Guard vessel "would perform its functions with reasonable care." 372 F.2d at 195.

substantively different from those in this case. Specifically, *Chanon* recognized that "a forecast that turns out to be an erroneous forecast, standing alone, should not be considered as any evidence of fault on the part of the Weather Service." *Id.* at 1041. Here, plaintiffs do not allege that the government was negligent merely because it issued an incorrect forecast. Rather, they argue that defendants were negligent in failing, for more than three months, to make any effort to repair a data buoy whose purpose was to provide information recognized as vital to a reliable forecast—or to even give warning that the critical buoy was essentially out of action.[11] This court agrees.

2). *Breach*

Plaintiffs contend that the government breached its duty of due care in deciding not to make any effort to repair the Georges Bank buoy in September merely because the buoy was scheduled to be replaced in January. Plaintiffs argue further that the government's failure to warn mariners that the Georges Bank buoy was not operational exacerbated its negligence. Again, this court agrees.

Under the circumstances here, the conscious decision not to repair the Georges Bank buoy in September merely because it was scheduled to be replaced in January was unreasonable. The buoy information was critical to a reliable forecast. Its data would be unavailable during fall and winter months. Furthermore, the decision by the project manager to replace in January rather than repair in September was made without

[11] In two other cases brought against the NWS, district courts have held that the plaintiffs were not entitled to recovery. *See Williams* v. *United States*, 504 F. Supp. 746 (E.D. Mo. 1980); *Bartie* v. *United States*, 216 F. Supp. 10 (W.D. La. 1963), *aff'd* 326 F.2d 754 (5th Cir. 1964), *cert. denied*, 379 U.S. 852 (1964). These cases are distinguishable from the instant case because they involved attempts to hold the NWS liable for merely issuing an incorrect weather forecast, with no showing of any other negligent act. *See Williams*, 504 F. Supp. at 750; *Bartie*, 216 F. Supp. at 19.

any inquiry as to how easy or difficult it would be to get the buoy back in action on an interim basis. Indeed, the buoy project manager admitted that he did not make any inquiry of anyone to see if personnel were available to repair the Georges Bank buoy.[12] *Cf. Tringali Brothers* v. *United States*, 630 F.2d 1089, 1093 (5th Cir. 1980) (fourteen day delay in returning navigational buoy to proper location held unreasonable).

Moreover, no attempt was made to notify mariners that the monitoring and prediction system was not functioning properly, particularly those mariners contemplating a venture to the Georges Bank area. It is unnecessary, therefore, to consider whether the government would have met its duty if it had notified mariners of the equipment failure. *Cf. Greer* v. *United States*, 505 F.2d 90, 92 (2d Cir. 1974) (notice of malfunction of navigational aid does not remove government obligation to correct potentially dangerous condition).

3). *Causation*

This court is persuaded by the evidence that the defendant's breach of duty was a "substantial factor" in causing the deaths of fishermen here. *See Gercey* v. *United States*, 540 F.2d 536, 538 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); W. Prosser, *Handbook of the Law of Torts* 240 (4th ed. 1971). Two areas of evidence are of particular import. The first is the expert testimony of Mr. Haggard[13] that the NWS forecast was significantly incorrect as of 7 a.m. on November 21, 1980, that a storm warning should have been issued no later than 10:39 p.m. that day, and that the lack of buoy data from Georges Bank was critical to the NWS error. The second is the testimony of Captain Brown that if he had received a proper storm warning by 11 p.m. on November 21, 1980 he would have turned around because of the danger, and would have been able to return safely to port. The court considers the testimony of both witnesses to be credible and persuasive.

[12] TR 6-85.

[13] *Supra* pt. III.

4). *Damages*

This was a bifurcated trial dealing solely with the issue of liability. It is not disputed, however, that the seamen in question were killed during the course of the subject storm.

B. *DEFENSES*

By way of affirmative defense, defendant argues that this action is barred by the discretionary function and the misrepresentation exceptions to the government's waiver of sovereign immunity in the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* (1982).

1). *Discretionary function*

In pertinent part, the discretionary function exception provides that the United States shall not be liable on

> [a]ny claim based upon an act or omission of any employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a) (1982).

As a preliminary matter, there is disagreement as to whether the discretionary function exception applies to cases under the Suits in Admiralty Act, 46 U.S.C. § 741 *et seq. Compare Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977) *with DeBardeleben Marine Corp.* v. *United States*, 451 F.2d 140, 146 (5th Cir. 1971). This court, of course, accepts and follows the First Circuit's pronouncement in *Gercey* that the discretionary function exception applies to the Suits in Admiralty Act as well as to the Federal Tort Claims Act. *See* 540 F.2d at 146.

While its exact scope has never been defined, *see Dalehite* v. *United States*, 346 U.S. 15, 35 (1953), the Supreme Court recently set forth two factors to be considered in determining whether the government is protected by the discretionary function exception. *See United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 52 U.S.L.W. 4833, 4837 (U.S. June 19, 1984). First, a court should consider whether "the Government is acting in its role as a regulator of the conduct of private individuals." *Id.* Second, the court should determine whether the conduct of the government employee—as opposed to his or her status—is of the nature and quality that Congress intended to shield from tort liability. *Id.* In *Varig Airlines*, the plaintiffs alleged that the Federal Aviation Administration negligently failed to inspect certain portions of two aircraft before certifying them for use in commercial aviation. *Id.* at 4838. The Supreme Court concluded that this licensing or certification activity was regulatory in nature. *Id.* at 4838-39. By contrast, defendant in this case was not involved in licensing or certification, but rather in providing a service that, absent government involvement, could have been provided by a private concern.

Whether defendant's negligent acts were of the nature and quality that Congress intended to shield from tort liability is a more difficult question, requiring inquiry into the legislative history of the discretionary function exception. *See generally*, *United States* v. *Varig Airlines*, 52 U.S.L.W. at 4836, *Dalehite* v. *United States*, 346 U.S. at 24-30. From this legislative history two important principles can be gleaned. First, the discretionary function exception was intended to

> preclude any possibility that the bill might be construed to authorize a suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any government agent is shown, and the only ground for suit is the contention that the same conduct by

> a private individual would be tortious, or that the statute or regulation authorizing the project was invalid.

Dalehite v. *United States*, 346 U.S. at 29 n.21 (quoting H.R. 2245, 77th Cong., 2d Sess. (1942)). Second, Congress intended to exempt discretionary activities, that is, activities "[w]here there is room for policy judgment. . . ." *Id.* at 36.

The theory of liability asserted by plaintiffs is not barred by either of these principles. This case is not an attempt to challenge a properly performed, congressionally authorized activity on the theory that similar activity by a private person would be tortious. Plaintiffs, moreover, are not attempting to gain judicial review of an authorizing statute or regulation. They simply assert that defendant induced reliance and then negligently failed to perform.

In addition, the government action here did not involve a policy judgment. The decision to have a weather monitoring and prediction system and the decisions concerning the methods for obtaining observational data may have involved policy judgments. *See Bartie* v. *United States*, 216 F. Supp. 10, 19 (W.D. La. 1963), *aff'd*, 326 F.2d 754 (1964), *cert. denied*, 379 U.S. 852 (1964). Plaintiffs do not challenge those judgments. But, once a system was in place and mariners began to rely on it, the time for policy judgments was past. *See Coastwise Packet Co.* v. *United States*, 398 F.2d 77, 80 (1st Cir. 1968) (discretionary function exception provides almost complete protection to government decisions concerning initiation of a program, but protection decreases after program or policy is established), *cert. denied*, 393 U.S. 937 (1968); *Seaboard Coast Line Railroad Co.* v. *United States*, 473 F.2d 714, 716 (5th Cir. 1973) (same).

Plaintiffs complaint is that, after inducing reliance on its selected weather system, the government negligently chose not to keep it in repair and failed to issue any warning concerning its disrepair to those relying on it. The law does not permit the government, under the guise of policy making, to negligently

remove its proffered safety net without reasonable notice to those who risk their lives daily in reliance on it. For these reasons, the discretionary function defense must be rejected.

2). *Misrepresentation*

Defendant maintains that the plaintiffs' claims are barred by the so-called "misrepresentation" exception to the Federal Tort Claims Act, which states in pertinent part that:

> The provisions of [the Federal Tort Claims Act] shall not apply to . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . .

28 U.S.C. § 2680(h) (1982).

Although the First Circuit has ruled in *Gercey* v. *United States*, *supra*, that the "discretionary function" defense under the Federal Tort Claims Act is applicable to actions under the Suits in Admiralty Act, it has never issued a similar ruling with respect to the "misrepresentation" defense.

In the analogous case of *Ingham* v. *Eastern Air Lines*, 373 F.2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967), a federal aircraft controller failed to alert an incoming aircraft that visibility had been reduced from one mile to three quarters of a mile as a result of a change in weather. The aircraft crashed and the government was found liable under the Federal Tort Claims Act. On appeal, the government asserted the misrepresentation defense on the ground that the controller's failure to alert the aircraft to the change in visibility was a misrepresentation. In rejecting this defense, the Second Circuit stated:

> [T]he government's reading of the misrepresentation exception is much too broad, for it would exempt from tort liability any operational malfunction by the government that involved communications in any form. . . . Where the gravamen of the complaint is the negligent performance of operational tasks, rather than misrepresentation, the government may not rely upon § 2680(h) to absolve itself of liability.

Id. at 239.

In this case, the inaccurate forecast was the consequence of the government's negligent performance of the operational task it had assumed of compiling data on the weather at sea from offshore buoys. Since the government's negligence in performing this operational task is the basis of the plaintiff's complaint, the government cannot rely on the misrepresentation defense.

The Supreme Court's recent decision in *Block* v. *Neal*, 460 U.S. 289 (1983), is also instructive as to the inapplicability of the misrepresentation defense in this case. In *Neal*, the plaintiff claimed that the Farmers Home Administration ("FmHA") had failed to use due care in supervising the construction of her house, and had led her to believe that the house was properly constructed when in fact it was not. In rejecting the government's misrepresentation defense, the Court stated: "Section 2680(h) thus relieves the Government of tort liability for pecuniary injuries which are wholly attributable to the Government's negligent misstatements."[14] *Id.* at 297. In *Neal*, the

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[14] The fact that the plaintiffs in this case seek compensation for personal as opposed to pecuniary injuries does not detract from this statement's applicability. To the contrary, the misrepresentation defense is more appropriate in cases involving pecuniary injuries than those involving other types of injuries. In *United States* v. *Neustadt*, 366 U.S. 696 (1961), a case involving pecuniary injuries, the Court held that the government was protected by the misrepresentation defense. The *Neustadt* Court distinguished *Indian Towing*, *supra*, a case involving property damage, on the ground that there was no misrepresentation in *Indian Towing*. In so doing, the Court stated:

> As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but "[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings."

Id. at 711 n. 26.

plaintiff's injuries were not attributable to the FmHA's misrepresentation as to the quality of the construction. In this case, the plaintiffs' claim is not based on the inaccurate weather forecasts but rather on the cause of their inaccuracy—the government's negligent failure to maintain the Georges Bank buoy.

CONCLUSION

For the reasons set forth in this opinion, a judgment is entered for the plaintiffs on the issue of liability. A pre-trial conference on the issue of damages will be held on January 28, 1985 at 10 a.m.

It is so ORDERED.

JOSEPH L. TAURO
United States District Judge

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 85-1805.

HONOUR BROWN, ETC., ET AL.,
PLAINTIFFS, APPELLEES,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

SEA FEVER CORPORATION,
THIRD-PARTY PLAINTIFF, APPELLANT.

Before
BOWNES and ALDRICH, *Circuit Judges*,
and PETTINE,* *Senior District Judge*.

ORDER OF COURT
ENTERED: MAY 13, 1986

In light of our decision in companion case No. 85-1790, this appeal is dismissed as moot.

BY THE COURT:
(s) FRANCIS P. SCIGLIANO,
Clerk.

* Of the District of Rhode Island, sitting by designation.

[cc: Kenfield, Willmore and Latti]

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 86-202 and 86-528

In the Supreme Court of the United States

OCTOBER TERM, 1986

SEA FEVER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

HONOUR BROWN, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, waives the sovereign immunity of the United States with respect to maritime tort claims arising out of discretionary government functions.

2. Whether, assuming a discretionary function exception to the waiver of immunity under the Suits in Admiralty Act, that exception encompasses petitioners' claims that they were injured by inaccurate weather forecasts resulting from government decisions concerning the weather forecasting program.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-202

SEA FEVER CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-528

HONOUR BROWN, ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 86-528 (Pet. App. A1-A12) is reported at 790 F.2d 199.[1] The order of the court of appeals in No. 86-202 (Pet. App. A37) is unreported. The opinion of the district

[1] Unless otherwise noted, citations to "Pet. App." refer to the appendix to the petition in No. 86-528.

court (Pet. App. A12-A36) is reported at 599 F. Supp. 877.

JURISDICTION

The judgments of the court of appeals were entered on May 13, 1986. The petition for a writ of certiorari in No. 86-202 was filed on August 7, 1986. On August 5, 1986, Justice Brennan issued an order extending the time for filing a petition for a writ of certiorari in No. 86-528 to and including September 25, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the National Data Buoy Program, which is administered by the National Oceanic and Atmospheric Administration (NOAA), weather buoys are moored at various points off the coast of the United States. The buoys transmit weather data, including wind speed and direction, sea level barometric pressure, air temperature, sea surface temperature, and wave height, to the National Meteorological Center. The data are relayed to offices of the National Weather Service (NWS) and used, along with satellite photographs and reports from passing ships, in preparing weather forecasts. The maintenance and repair of weather buoys is supervised by the NOAA Data Buoy Center. The Center coordinates the schedule of repairs with a private maintenance contractor and the Coast Guard, which provides ship support in connection with the maintenance program. Pet. App. A3, A18-A20.

Beginning in March 1977, buoy number 6N12 was located at station 44003 in Georges Bank, off the New England coast. The buoy ceased reporting wind speed and direction in May 1980, was further damaged in early August 1980 when struck by a passing vessel, and was repaired on August 11 so that it was again functioning in all respects. In early September, the wind speed and direction data from buoy 6N12 were found to be erratic; the data exhibited a characteristic known as 'spiking.' Pet. App. A3; see also *id.* at A19-A20. The Meteorological Center accordingly stopped transmitting information from buoy 6N12 to the National Weather Service offices (*id.* at A3). Plans to promptly replace the malfunctioning buoy were frustrated when two possible substitutes went adrift. Further temporary repairs to buoy 6N12 were not attempted because the Data Buoy Center planned to replace buoy 6N12 with buoy 6N3 in January 1981. *Id.* at A4.

On November 21, 1980, the fishing vessels SEA FEVER and FAIRWIND left Hyannis, Massachusetts, for the fishing grounds near Georges Bank. The National Weather Service marine weather forecast for that date predicted good weather in the fishing grounds. The vessels arrived at the fishing grounds on November 22. "The 5:00 a.m. [weather] report [on November 22] carried a gale warning, predicting northwest winds, 30 to 40 knots for the area, diminishing by night, with seas 6 to 12 feet, subsiding at night. In point of fact, the vessels were already experiencing such winds, and even greater seas. This was too much weather, but because of the wind's direction, it was impossible to turn back." Pet. App. A2; see also *id.* at A13-A17. The weather report broadcast six hours later warned of an even more intense storm, but "[a]gain, the storm was already even greater than the forecast" (*id.* at A2). This type of storm is known as a "bomb" because of its "sudden and explosive development" (*ibid.*). The

FAIRWIND sank and three of her crew drowned; the SEA FEVER suffered damage and one of her crew, Gary Brown, drowned (*id.* at A2, A18).

Petitioners Honour Brown, Angelo Garnos, and George Berry, the personal representatives of deceased crew members, subsequently commenced this action against the United States in the United States District Court for the District of Massachusetts. They sought damages under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, alleging that the absence of information from a buoy at station 44003 rendered the NWS forecasts inaccurate, that the vessels acted in reliance upon those forecasts, and that the deaths of the crew members therefore were proximately caused by the government's negligent failure to maintain the buoy.[2]

[2] Petitioner Sea Fever Corporation, the owner of one of the fishing vessels, asserted a third-party claim against the United States seeking indemnification and contribution in connection with its settlement of an action commenced by petitioner Honour Brown alleging that Sea Fever's negligence and the unseaworthiness of its vessel caused the death of Brown's decedent. The district court denied the claim, holding that the settlement "arose out of a lawsuit alleging that Sea Fever was responsible for its own negligence and the unseaworthiness of its vessel." *Brown* v. *United States*, 615 F. Supp. 391, 407 (D. Mass. 1985). Since the underlying claim did not allege that Sea Fever was responsible for the government's negligence, the district court found that "Sea Fever has no cause of action for tort indemnification" (*ibid.*). The district court also rejected Sea Fever's claim for contribution from the government. The court of appeals dismissed Sea Fever's appeal, observing that its claim for indemnification and contribution was mooted by the court's determination that the government was not liable to the other petitioners (Pet. App. A1 n.*, A37). Sea Fever does not raise any issues separate from the other petitioners before this Court (see 86-202 Pet. 3-4); it simply requests the vacation of the adverse ruling by the court of appeals in the event this Court reverses the judgment challenged in No. 86-528.

The district court entered judgment in favor of petitioners on the issue of liability (Pet. App. A13-A36). It first observed that "[a]s with all tort actions, [petitioners] bear the burden of showing: (1) that [the United States] owed them a duty of care; (2) that the duty was breached; and (3) that the breach caused [petitioners] harm" (*id.* at A24).

With respect to the government's duty, the court concluded that "[t]he legislative history leading to the creation of the NOAA demonstrates clearly that the government intended to undertake and meet the responsibility for providing a reliable weather monitoring and prediction system for the use of commercial fishermen" (Pet. App. A24 (footnote omitted)). Since fishermen relied upon these weather reports, the court found that the government owed these fishermen "a duty to take reasonable care in maintaining its weather observation and prediction system" (*id.* at A26). The government breached this duty, according to the district court, because "the conscious decision not to repair the Georges Bank buoy in September merely because it was scheduled to be replaced in January was unreasonable" (*id.* at A29).

The court found that the requirement of causation was satisfied by "evidence that the * * * breach of duty was a 'substantial factor' in causing the deaths of fishermen here" (Pet. App. A30). It cited expert testimony that "the NWS forecast was significantly incorrect as of 7 a.m. on November 21, 1980, that a storm warning should have been issued [on that date] * * *, and that the lack of buoy data from

Georges Bank was critical to the NWS error" (*ibid.*). The court further noted that the vessel captain testified that he would have turned back if the forecast had contained a storm warning (*ibid.*).

The court held that the government was not immune from liability under the discretionary function exception.[3] It observed that "the government action here did not involve a policy judgment. The decision to have a weather monitoring and prediction system and the decisions concerning the methods for obtaining observational data may have involved policy judgments. * * * But, once a system was in place and mariners began to rely on it, the time for policy judgments was past" (Pet. App. A33 (citations omitted)). The court found that because the government "negligently chose not to keep [the weather system] in repair and failed to issue any warning concerning its disrepair to those relying on it," the exception did not apply (*ibid.*).[4]

2. The court of appeals unanimously reversed (Pet. App. A1-A12), holding that the government was protected from liability because the decision to issue a weather forecast without repairing the buoy was the result of the exercise of discretion within the meaning of the discretionary function exception to

[3] Following *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), the district court found that the discretionary function exception applies to cases under the Suits in Admiralty Act (see Pet. App. A31).

[4] The court also rejected the government's contention that petitioners' claims were barred by the misrepresentation exception to tort liability (Pet. App. A34-A36). In its subsequent opinion on the issue of damages, the district court awarded petitioners in excess of $1.25 million (*Brown* v. *United States*, 615 F. Supp. at 404-405).

tort liability.[5] The court observed that "the government not only has discretion whether or not to engage [in a discretionary function], but discretion to determine the extent to which it will do so" (*id.* at A5). It noted its own decision in *Chute* v. *United States*, 610 F.2d 7 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980), where the court rejected the plaintiff's argument that the Coast Guard was liable in tort because it failed to mark a sunken wreck with the most "effective" type of buoy (Pet. App. A6):

> The rationale of *Chute* was that although the Coast Guard is known to have undertaken marking dangers to navigation, the extent to which it will do so is a discretionary function. There can be no justified reliance upon, or expectation of, any particular degree of performance; something more is needed to establish liability. "[T]here are various degrees of protection. Courts have neither the expertise, the information, nor the authority to allocate the finite resources available to the Secretary among competing priorities." 610 F.2d at 12.

The court of appeals observed that the government did not make an affirmative misstatement of fact to the effect that an operating buoy was currently providing wind data from location 44003, and stated that reports referring to individual reporting sites had not included wind data from station 44003 since September 9, 1980. "[Petitioners'] complaint is,

[5] The court noted (Pet. App. A2-A3 & n.1) that the discretionary function exception contained in the Federal Tort Claims Act (28 U.S.C. 2680(a)) applies to actions against the United States under the Suits in Admiralty Act, which petitioners had conceded to be the law in the First Circuit (Appellees' Br. 25 n.2).

rather, that the government's weather predictions were not up to an adequate standard because the forecaster lacked that particular information" (Pet. App. A8 (footnote omitted)). It noted that petitioners' theory of liability could not be limited to the failure to maintain a supplier of information such as the buoy, but (*id.* at A8-A9)

> would apply to anything judicially found unreasonably to impair the quality of the prediction. An expert might testify, and a court accept, that to prepare a fully adequate weather report would call for still additional buoys, or for more advanced computers, or for more operators. Or it might find malfeasance in the processing. All of these are matters which Congress reserved, both to itself in respect to appropriations, and to the agencies' conduct, by the discretionary exception from the F.T.C.A.'s consent to suit.

The court of appeals also found that the district court erred by concluding that fishermen's reliance upon NWS forecasts subjected the government to liability. The legislative history showing that Congress recognized the need for accurate weather forecasting "prove[d] too much" according to the court of appeals because "[p]resumably a need is found for every government service or it would not be undertaken in the first place. Need cannot, by implication, amend the plain language of the discretionary function exception. * * * [T]he fishermen cannot unilaterally impose on the government a liability it has expressly disclaimed" (Pet. App. A10).

Finally, the court stated that "the Weather Service is a particularly unfortunate area in which to establish a duty of judicially reviewable due care" (Pet.

App. A10). Thus, "[a] weather forecast is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources. Weather predictions fail on frequent occasions. If in only a small proportion parties suffering in consequence succeeded in producing an expert who could persuade a judge, as here, that the government should have done better, the burden on the fisc would be both unlimited and intolerable" (*id.* at A10-A11). The court concluded that the discretionary function exception bars the imposition of this sort of liability upon the government.[6]

ARGUMENT

1. Petitioners contend (86-528 Pet. 5-8) that the Suits in Admiralty Act subjects the United States to tort liability for acts and omissions relating to discretionary government functions. Petitioners' argument is meritless.

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[6] The court also rejected petitioners' argument that the government had a duty to inform fishermen that the buoy at location 44003 was not providing wind data. It stated that "the government has a policy not to report the underlying structure or basis of its weather computing system, or of changes therein. Such a policy is a classic discretionary matter not subject to judicial review" (Pet. App. A11).

Judge Pettine concurred (Pet. App. A12), emphasizing that petitioners' claim did not rest upon an affirmative misstatement of fact, but "rested on the prediction itself, which at any one time is made up of a number of factors, no one of which is necessarily determinative" (*ibid.*). He observed that imposing liability upon the government would require courts to "assess[] the adequacy of this government service, for who is to say what components are necessary to maintaining the previously set level of prediction" (*ibid.*).

a. In 1960, Congress expanded the Suits in Admiralty Act to include all maritime claims against the United States; the statute encompasses any action against the United States that would have been maintainable in admiralty "if a private person or property were involved" (46 U.S.C. 742). Prior to that amendment, maritime tort claims fell under the Federal Tort Claims Act and jurisdiction was in federal district court.[7]

Despite the absence of an express discretionary function exception in the Suits in Admiralty Act, all but one of the courts of appeals that have addressed the issue have concluded that the 1960 amendment to the Suits in Admiralty Act did not expose the government to liability for discretionary functions that was previously barred under the then-applicable FTCA. *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); *Wiggins* v. *United States*, 799 F.2d 962, 964-966 (5th Cir. 1986); *Bearce* v. *United States*, 614 F.2d 556, 558-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Williams* v. *United States*, 747 F.2d 700 (11th Cir. 1984), aff'g 581 F. Supp. 847, 852 (S.D. Ga. 1983); *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980); see also *Gemp* v. *United States*, 684 F.2d 404,

[7] Prior to 1960, the Suits in Admiralty Act applied solely to cases involving government merchant vessels. Contract claims that did not fall within that category—and that also were not cognizable under the Public Vessels Act—could only be brought under the Tucker Act; if the contract claim exceeded $10,000, jurisdiction was in the Court of Claims. *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 166-167, 172-173 (1976). Congress amended the Suits in Admiralty Act because of the "difficulty in determining the appropriate forum for a maritime claim against the United States" (*id.* at 175).

408 (6th Cir. 1982). Two related rationales support the conclusion reached by these courts.

First, in *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976), this Court rejected the argument that the 1960 amendment to the Suits in Admiralty Act "enable[d] suits previously cognizable under the Public Vessels Act to be brought under the Suits in Admiralty Act, free from the restrictive provisions of the Public Vessels Act" (425 U.S. at 178) —in that case, limiting suit to foreign nationals whose governments allow a reciprocal right of action. Observing that "Congress' basic purpose" was "to remove uncertainty over the proper forum for a claim against the United States," the Court declined to adopt an interpretation of the 1960 amendment that "would effectively nullify specific policy judgments made by Congress when it enacted the Public Vessels Act" (*id.* at 178, 181).

The reasoning applied by the Court in *United Continental Tuna Co.* is equally relevant here. Prior to the 1960 amendment, the exceptions to liability contained in the Tort Claims Act applied with respect to maritime tort claims against the United States. Nothing in the legislative history of the 1960 amendments indicates that Congress intended to exempt maritime tort claims from this carefully crafted scheme. Congress's sole goal was to clarify the proper forum for maritime claims; it did not intend to expand the waiver of the sovereign immunity so as to increase the government's tort liability. *Bearce* v. *United States*, 614 F.2d at 559-560.[8]

[8] The express exception of maritime claims from the Tort Claims Act (see 28 U.S.C. 2860(d)), which was added when Congress expanded the Suits in Admiralty Act, does not indicate that Congress intended such a result. The exception

Second, and more importantly, the discretionary function exception touches upon important constitutional principles; those principles support the implication of an exception applicable to tort actions under the Suits in Admiralty Act.

This Court has observed that at the time that Congress enacted the Federal Tort Claims Act "[i]t was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction" (*United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 810 (1984)). This is because "the exemption for discretionary functions * * * was derived from the doctrine of separation of powers, a doctrine to which the courts must adhere even in the absence of an explicit statutory command" (*Canadian Transport Co.* v. *United States*, 663 F.2d at 1086). Judicial scrutiny of discretionary Executive Branch determinations would permit " 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," and thereby implicate separation of powers concerns (*Varig Airlines*, 467 U.S. at 814). Congress believed that the courts would avoid improper interference with Executive Branch decisionmaking by construing the Tort Claims Act to bar tort actions arising out of discretionary government determinations.

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reduces confusion over the procedures governing maritime tort claims by eliminating the district courts' civil jurisdiction over tort claims cognizable in admiralty under the Suits in Admiralty Act.

Congress included an express discretionary function exception in the Tort Claims Act "to make clear that the Act was not to be extended into the realm of the validity of legislation or discretionary administrative action" (*Varig Airlines*, 467 U.S. at 810). In the absence of such an exception from tort liability under the Suits in Admiralty Act, "respect for the doctrine of separation of powers requires that * * * courts should refrain from passing judgment on the appropriateness of actions of the executive branch which meet the requirements of the discretionary function exception of the [Tort Claims Act]" (*Canadian Transport Co.* v. *United States*, 663 F.2d at 1085). Otherwise, "every decision of a government official cognizable under [the] Act would be subject to second-guessing by a court on the claim that the decision was negligent" (*Wiggins* v. *United States*, 799 F.2d at 966).

b. The Fourth Circuit reached a different conclusion in *Lane* v. *United States*, 529 F.2d 175, 179 (1975), holding that the government's liability under the Suits in Admiralty Act was not limited by a discretionary function exception. However, the *Lane* decision predated this Court's decision in *United Continental Tuna Co.* and, as we have discussed, this Court's construction of the 1960 amendment to the Suits in Admiralty Act undercuts the result in *Lane*.

Moreover, a subsequent Fourth Circuit decision appears to contradict the decision in *Lane*. In *Faust* v. *South Carolina State Highway Department*, 721 F.2d 934 (1983), cert. denied, 467 U.S. 1226 (1984), one of the issues was whether the United States could be liable in tort under the Suits in Admiralty Act for issuing a permit that authorized the

maintenance of an obstruction in a navigable waterway. The court of appeals held in favor of the government, stating that it knew of "no decision holding the United States liable in tort on the basis of an alleged failure by the Corps of Engineers to fulfill its statutory mandate to regulate obstructions placed in the navigable waterways" (721 F.2d at 938 (footnote omitted)). The court noted that "several courts have held the grant of a permit [under the federal statute] to be an unreviewable discretionary function. If the issuance of the permit is unreviewable, we cannot see how the United States can be held liable for having issued a permit to allow a hazardous obstruction to exist" (*id.* at 939 (citations omitted)).

Although the *Faust* court did not frame the issue in terms of the discretionary function exception, and did not discuss the Fourth Circuit's prior decision in *Lane*, it is difficult to reconcile the reasoning in the two cases. The *Faust* court concluded that the United States could not be held liable in tort for breaching a statutory duty because the exercise of this statutory authority was not subject to judicial review. Most significantly, the cases cited by the court in support of that conclusion were cases applying the discretionary function exception to bar the imposition of tort liability upon the United States. See *Faust*, 721 F.2d at 939, citing *Gemp* v. *United States*, *supra*, and *Boston Edison Co.* v. *Great Lakes Dredge & Dock Co.*, 423 F.2d 891 (1st Cir. 1970). As the Fifth Circuit observed in declining to follow the Fourth Circuit's decision in *Lane*, "[i]t can fairly be said [in light of *Faust*] that the Fourth Circuit is no longer on record as having held unassailably that no discretionary function exception is implied in the [Suits in Admiralty Act]. It has weakened or cast doubt upon the holding in *Lane*, although it has not overruled

it" (*Wiggins* v. *United States*, 799 F.2d at 965).[9] In view of the uncertain status of *Lane*, there is no conflict among the courts of appeals warranting resolution by this Court.[10]

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[9] Indeed, *Faust* is not the only case that casts doubt upon the validity of *Lane*. In *Magno* v. *Corros*, 630 F.2d 224 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981), the court rejected the plaintiff's claim that the Coast Guard was negligent in the manner in which it lighted a dike. In support of its conclusion the court stated in part:

> Given the tremendous expense which would undoubtedly be involved in lighting all the authorized obstructions under the control of the Coast Guard, in the absence of a Congressionally imposed requirement of additional marking, we feel that it is usually inappropriate for a federal court to impose such a requirement and in effect direct the Coast Guard how to spend its limited resources. Every dollar of its money that we direct it spend is diverted from another regulatory activity.

630 F.2d at 229 (footnote omitted). The court cited in support of this statement the portion of the opinion in *Gercey* v. *United States*, *supra*, that held that the discretionary function exception applied to tort actions under the Suits in Admiralty Act. The reliance upon *Gercey* also calls into question the vitality of *Lane*.

[10] Petitioners cite (86-528 Pet. 6-7) *De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140 (5th Cir. 1971), but that decision was rejected by the Fifth Circuit in *Wiggins* v. *United States*, 799 F.2d at 964-966. Petitioners also contend (86-528 Pet. 7) that the Ninth Circuit has reached a conclusion that conflicts with the decision below, but the decision upon which they rely is wholly irrelevant to the issue presented here. The holding in *Nelson* v. *United States*, 639 F.2d 469 (9th Cir. 1980), was that the government was not liable for the conduct of an independent contractor (see 639 F.2d at 479). In the course of reaching that conclusion, the court of appeals addressed the question whether the plaintiff's claim against the United States fell within the district court's

2. Petitioners also argue (85-528 Pet. 8-13) that the court of appeals erred by concluding that their claim is barred by the discretionary function exception, assuming such an exception is applicable. The court of appeals' decision is correct; review by this Court is not warranted.

a. This Court considered the discretionary function exception in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), *supra*. The Court concluded that Congress adopted the exception because it "wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions * * * Congress took 'steps to protect the Government from liability that would seriously handicap efficient government operations" (467 U.S. at 814 (citation omitted)).

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admiralty jurisdiction. The court observed that "[t]he [plaintiff's] suit alleged negligence, and the court had jurisdiction under the Suits in Admiralty Act. The Suits in Admiralty Act, however, does not itself provide a cause of action. It merely operates to waive the sovereign immunity of the United States in admiralty suits" (*id.* at 473 (citation omitted)). This discussion has nothing whatever to do with the question whether the discretionary function exception applies in actions under the Suits in Admiralty Act; the court simply observed that the Act supplied a basis for jurisdiction and went on to find that the plaintiff's allegation of negligence stated a cause of action (*ibid.*). Since the court was not considering any issue relating to the discretionary function exception, this general statement cannot be interpreted as rejecting the application of the exception to maritime tort actions.

The particular question in *Varig Airlines* was whether the government could be held liable in tort for negligently failing to perform certain inspections in connection with the issuance of certificates authorizing the manufacture of an airplane. The Court noted that the plaintiffs "challenge[d] two aspects of the certification procedure: the [Federal Aviation Administration's] decision to implement [a] 'spot-check' system of compliance review, and the application of that 'spot-check' system to the particular aircraft involved in these cases" (467 U.S. at 819). The Court concluded that the agency's "implementation of a mechanism for compliance review" constituted a discretionary activity (*ibid.*). It observed that "decisions [as to the manner of enforcing regulations] require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objects sought to be obtained against such practical considerations as staffing and funding. Here, the FAA has determined that a program of 'spot-checking' manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation safety and the reality of finite agency resources" (*id.* at 820).

The Court further concluded that "the acts of FAA employees in executing the 'spot-check' program in accordance with agency directives are protected by the discretionary function exception as well" (467 U.S. at 820). It observed that "[t]he FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with

FAA regulations, and the efficient allocation of agency resources" (*ibid.*).[11]

The court of appeals here observed (Pet. App. A8) that the government determination that is at issue in the present case is the National Weather Service's decision that it possessed sufficient information to issue a weather forecast despite the lack of information from a buoy at location 44003. The question is whether that determination constituted an exercise of discretion encompassed within the discretionary function exception.[12] The decision that there is sufficient information to issue a weather forecast obviously is discretionary. The Court concluded in *Varig Airlines* that the Federal Aviation Administration exercised discretion within the meaning of the exception when it settled upon the quantity of information that must be gathered prior to the issuance of a certificate. The determination of the agencies of government charged with predicting the weather that a particular amount and character of information is sufficient to permit the issuance of a weather forecast similarly is a discretionary determination that is not subject to review in a tort action.

Indeed, in a field as inherently discretionary as weather prognostication, the designation of the amount of information necessary to support an offi-

[11] The same factors are relevant in determining whether the discretionary function exception applies in a situation outside the regulatory context. In *Dalehite* v. *United States*, 346 U.S. 15 (1953), a decision strongly reaffirmed in *Varig Airlines* (see 467 U.S. at 810-811, 813), the Court relied upon similar factors in concluding that the discretionary function exception barred tort claims based upon non-regulatory government activities. The case arose as a result of the explosion of chemical fertilizer stored in a government warehouse. The plaintiffs challenged as negligent the decisions leading up to the production of the fertilizer as well as the manner of storage of the fertilizer. The Court held that all of the claims were barred by the discretionary function exception. It observed that the exception "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable" (346 U.S. at 35-36 (footnote omitted)).

[12] Petitioners identify the government decision at issue here as the decision whether to replace buoy 6N12 (see, *e.g.*, Pet. 10, 11). But petitioners' decedents did not directly rely upon either the placement of that buoy or the information that would have been transmitted by that buoy; their claim is that the government was negligent in issuing a weather forecast without the information that would have been supplied by the buoy. See Pet. App. A8 ("[petitioners'] complaint is * * * that the government's weather predictions were not up to an adequate standard because the forecasters lacked [the data from the particular buoy]"). The question, therefore, is whether petitioners may obtain review in this tort action of the government's decision that it had sufficient information to issue a weather forecast.

Even if the decision in issue were solely whether to replace the particular buoy, the discretionary function exception would apply. The decision against further maintenance efforts was based upon the general procedures governing replacement of buoys and reflected policy determinations regarding the management of the entire buoy program, including the schedule for upgrading of buoys and the propriety of undertaking repairs when a buoy is scheduled to be replaced. Since the discretionary function exception "includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations" (*Dalehite*, 346 U.S. at 35-36 (footnote omitted)), it shielded the government from tort liability for the decision not to repair buoy 6N12. See also note 13, *infra*.

cial government prediction plainly rests upon the consideration of the factors identified by this Court in *Varig Airlines*—the agency's mission, its expert judgment, and practical constraints such as staffing and funding. As one of the members of the court of appeals panel observed, "[i]f courts are to interfere so as to ensure that the weather service continues to maintain a given level or quality of prediction, which is made up of numerous and varied factors, in effect, courts would be assessing the adequacy of this government service, for who is to say what components are necessary to maintaining the previously set level of prediction." Pet. App. A12; see also *id.* at A8-A9 (determination of information needed "to prepare a fully adequate weather report" reserved to Congress and "to the agencies' conduct"). The determination challenged by petitioners therefore is protected from review by the discretionary function exception.[13]

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[13] Petitioners assert (86-528 Pet. 10, 13) that the court below erred because its conclusion that the discretionary function exception barred their claim was based solely upon the government's authority to set priorities for the use of limited resources. First, the court did not rest its decision solely upon resource allocation considerations. It found that the selection of the data necessary to assure "the quality of the prediction" was a matter left to the discretion of Congress and the relevant agencies (Pet. App. A8-A9). Second, contrary to petitioners' implication, the fact that a decision rests upon staffing and funding considerations does not automatically render the discretionary function exception inapplicable. This Court in *Varig Airlines* twice cited these considerations in concluding that the challenged determinations were encompassed within the discretionary function exception (see 467 U.S. at 820). The courts of appeals have recognized that discretionary decisions resting upon these considerations fall within the discretionary function exception. See, *e.g.*, *Wiggins* v. *United States*, 799 F.2d at 966-967 (decision not to remove sunken pilings fell within discretionary function exception; decision rested in part on determination that "[i]t was uneconomic to do so").

b. Petitioners contend that the decision of the court below conflicts with a number of decisions of other courts of appeals. Although there is a lack of unanimity among the courts of appeals regarding the scope of the discretionary function exception, this case does not present an occasion to consider the conflicting approaches to that question because the United States would prevail under either approach.[14]

The appellate decisions cited by petitioners adopt the rule that the discretionary function exception extends only to "policy" and "planning" activities and not to "operational" activities. Other courts have not recognized such a limitation, and have instead concluded that the exception applies as long as the government decision is the result of the exercise of discretion. See, *e.g.*, *Wiggins* v. *United States*, 799 F.2d at 966-967; *Hylin* v. *United States*, 755 F.2d 551 (7th Cir. 1985); *General Public Utilities Corp.* v. *United States*, 745 F.2d 239 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985).

The decision below does not conflict with the decisions cited by petitioners, however, because the selection of a standard for the issuance of weather predictions plainly is a matter of planning or policy. As

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[14] Petitioners also intimate (86-528 Pet. 8-9) that the construction of the discretionary function exception adopted by the court below conflicts with this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). However, the Court explained in *Varig Airlines*, 467 U.S. at 812, that "the discretionary function exception was not implicated in *Indian Towing*" because the government had conceded the point.

we have discussed, the standard for the issuance of forecasts is a matter of great significance in the weather forecasting program; that determination is surely a policy or planning determination and, under *Dalehite*, the implementation of that policy determination cannot give rise to liability (see 346 U.S. at 36). Accordingly, even if the court below had adopted a rule limiting the discretionary function exception to planning determinations, the exception would bar petitioners' claim.[15]

[15] Petitioners emphasize two decisions concerning the placement of navigation buoys. See 86-528 Pet. 11-12, citing *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985), and *Drake Towing Co.* v. *Meisner Marine Construction Co.*, 765 F.2d 1060 (11th Cir. 1985). Both of these cases involved the government's alleged failure to properly place adequate buoys, used not to transmit weather or other information, but simply to act as physical markers as a warning to ships in the area. The factual similarity to the present case is thus far more apparent than real. See *Eklof Marine Corp.*, 762 F.2d at 201-202; *Drake Towing Co.*, 765 F.2d at 1062-1063. The decisions concerning the site, location, and number of such inert buoys were found in those cases not to implicate policy or planning considerations. See *Eklof Marine Corp.*, 762 F.2d at 205; *Drake Towing Co.*, 765 F.2d at 1064-1065. As we have discussed, the determination at issue in this case involves a broad and complex range of considerations about what information is reasonably necessary to an appropriate weather forecasting system, and does implicate planning and policy concerns. It therefore plainly falls within the discretionary function exception.

Further, in those cases, the inadequate numbers or misplacement of the buoys posed an affirmative hazard to ships relying on them for guidance. See *Eklof Marine Corp.*, 762 F.2d at 203; *Drake Towing Co.*, 765 F.2d at 1065-1066. Here, by contrast, the court of appeals emphasized that the government did not increase the hazard to petitioners' decedents through any affirmative misrepresentation (see Pet. App. A8, A12); the hazard stemmed from the weather rather than the action of the government (*id.* at A9). And petitioners' decedents relied upon the *forecast*, not the buoy. These decisions relating to the placement of navigation buoys are therefore inapposite.

Finally, the court of appeals' reference (Pet. App. A7) to a disagreement between *Eklof* and its decision in *Chute* v. *United States*, *supra*, does not indicate the existence of a conflict between *Eklof* and the present case. Although the government decisions challenged in *Eklof* and *Chute* may have rested solely upon government decisions allocating limited resources, the decision in the present case rested upon a variety of other discretionary considerations. See pages 19-20 & note 13, *supra*. The decision below is therefore distinguishable from the decisions in both of these other cases and does not present the question whether a decision based solely upon resource considerations falls within the discretionary function exception.

c. Even if the conflict among the courts of appeals regarding the construction of the discretionary function exception were properly presented in this case, review by this Court would not be appropriate because the judgment of the court of appeals can be supported on several alternative grounds.

First, the district court plainly erred by concluding that the government owed a duty of care to petitioners' decedents in connection with the issuance of weather forecasts. Indeed, the court of appeals rejected (Pet. App. A7-A8, A10) the district court's statement that the legislative history demonstrated that the government owed a duty of care to fishermen in connection with weather forecasting. It went on to conclude that "the Weather Service is a particularly unfortunate area in which to establish a duty of judicially reviewable due care" (*id.* at A10). In view of these statements, and the essentially universal conclusion of the lower courts that tort liability may

not be premised upon allegedly negligent weather forecasts (see pages 24-25, *infra*), the judgment below is justified on the ground that the government owed no duty to petitioners' decedents.[16]

Second, although the court of appeals did not squarely address the question, its opinion strongly indicates that the government's decision to issue a weather forecast under the circumstances was a reasonable one (see Pet. App. A4 & n.3). We submit that the government acted reasonably in (1) repairing buoy 6N12 in August 1980; (2) planning to deploy a substitute buoy when buoy 6N12 became inoperative; and (3) delaying further maintenance measures in view of the imminent replacement of buoy 6N12. Since the government's conduct was reasonable, petitioners' tort claims must fail on the ground that the government did not engage in negligent conduct.

Third, prior to the district court's decision in the present case, the courts repeatedly had rejected at-

[16] Petitioners relied upon this Court's decision in *Indian Towing Co.* in support of their claim that the government was subject to a duty to use reasonable care, but that decision plainly is distinguishable from the present case. The question in *Indian Towing* was whether the government was liable for the negligent operation of a lighthouse. The Court concluded that "once [the government] exercised its discretion to operate a light * * * and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order" (350 U.S. at 69). The weather forecast at issue here cannot be equated with the factual representation supplied by the lighthouse in *Indian Towing*; recipients of the forecast could not reasonably rely upon its predictions about future events. Since the government conduct could not "engender[] reliance," the government did not operate under a legal standard of due care in issuing the forecast.

tempts to hold the government liable in tort for inaccurate weather forecasts. See *National Mfg. Co.* v. *United States*, 210 F.2d 263, 279-280 (8th Cir.), cert. denied, 347 U.S. 967 (1954); *Williams* v. *United States*, 504 F. Supp. 746 (E.D. Mo. 1980); *Bartie* v. *United States*, 216 F. Supp. 10 (W.D. La. 1963).[17] As the court of appeals observed, "[a] weather forecast is a classic example of a prediction of indeterminate reliability, and a place peculiarly open to debatable decisions, including the desirable degree of investment of government funds and other resources. Weather predictions fail on frequent occasions. If in only a small proportion parties suffering in consequence succeeded in producing an expert who could persuade a judge, as here, that the government should have done better, the burden on the fisc would be both unlimited and intolerable" (Pet. App. A10-A11). In view of the special considerations implicated by weather forecasting, the issue in this case properly is regarded as sui generis and, in the absence of a conflict among the courts of appeals regarding the government's liability for weather forecasting, review by this Court is not warranted.

[17] In *Chanon* v. *United States*, 350 F.Supp. 1039 (S.D. Tex. 1972), aff'd, 480 F.2d 1227 (5th Cir. 1973), the district court concluded that the National Weather Service "was under the duty to use due care in gathering weather information," but held that the government had not acted negligently. In *Delroy* v. *United States*, No. 79-546 (S.D. Ind. Mar. 12, 1982), the United States was found liable for failure to predict a storm, but the case was settled on appeal.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY

BRIEF

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No. 86-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HONOUR BROWN, Individually and as Personal Representative of Gary M. Brown and as Administratrix of the Estate of Gary M. Brown; ANGELO J. GARNOS, Individually and as Personal Representative of William R. Garnos and as Administrator of the Estate of William R. Garnos; GEORGE M. BERRY, Individually and as Personal Representative of David L. Berry, and as Administrator of the Estate of David L. Berry,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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IN THE
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HONOUR BROWN, Individually and as Personal Representative of Gary M. Brown and as Administratrix of the Estate of Gary M. Brown; ANGELO J. GARNOS, Individually and as Personal Representative of William R. Garnos and as Administrator of the Estate of William R. Garnos; GEORGE M. BERRY, Individually and as Personal Representative of David L. Berry, and as Administrator of the Estate of David L. Berry,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY BRIEF

This case presents two issues that have divided the circuits.

1. The first issue is whether the Suits in Admiralty Act (SIAA), 46 U.S.C. § 741 *et seq.*, contains an implied governmental immunity for discretionary functions.

a. The government contends that such an immunity must be implied even though the SIAA expressly states that an admiralty action may be brought against the United States whenever an admiralty action could be maintained against a private party.

The government argues from history, but it does not begin at the beginning and it does not deal with the central purpose of the statute at issue. Prior to 1916, the doctrine of sovereign immunity barred any suit by a private owner whose vessel was damaged by a vessel owned or operated by the United States. As this Court explained in *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 170-71 (1976), the Shipping Act of 1916 and the Suits in Admiralty Act of 1920 grew out of Congress's desire to avoid *in rem* actions and to render the United States liable *in personam* for damages caused by its merchant vessels "if such a proceeding could have been maintained had the vessel been a private vessel. . . ." 425 U.S. at 171. No exceptions for discretionary functions were inserted; Congress intended that this remedial measure be broadly construed. Summing up several decades of judicial interpretation, the Second Circuit has admonished, "We are to remember that the Suits in Admiralty Act is not to be construed with the same jealousy that ordinarily circumscribes the consent of the United States to be sued. . . ." *Grillea v. United States*, 232 F.2d 919, 921 (2d Cir. 1956) (Hand, J., collecting cases).

Up to 1960, the admiralty remedy provided by the SIAA was limited to cases in which a vessel owned or operated by the United States had been employed as a "merchant vessel." 41 Stat. 525, 46 U.S.C. § 742 (1958 ed.). Cases involving other public vessels were brought in admiralty under the Public Vessels Act, 43 Stat. 1112, as amended, 46 U.S.C. § 781 *et seq.*; maritime cases involving contracts were brought in the Court of Claims under the Tucker Act, 28 U.S.C. § 1346(a)(2); and maritime tort claims not falling under any of these statutes could be brought only on the law side of the district courts under the Federal Tort Claims Act.

Because of the confusion and mistaken filings that this scheme engendered, Congress acted in 1960 to place all maritime claims against the United States within the admiralty jurisdiction of the U.S. District Courts under the SIAA. *See United States v. United Continental Tuna*

Corp., supra, 425 U.S. at 172-78. The 1960 Amendments expanded the coverage of that Act to permit recovery against the United States in any case in which, "if a private person or property were involved, a proceeding in admiralty could be maintained. . . ." 74 Stat. 912, 46 U.S.C. § 742. Congress also specifically excepted such maritime claims from the operation of the Federal Tort Claims Act. 28 U.S.C. § 2680(d).

Thus, the fact that the Federal Tort Claims Act still contains an explicit discretionary function exemption is at best irrelevant. Congress had a choice of statutory schemes; it emphatically chose the one without a discretionary function exemption and the one that had received the broadest remedial interpretation in the courts. Indeed, Congress explicitly excepted lawsuits of this kind from the one statute that contained a discretionary function exemption.[1] In these circumstances, the importation of such an exemption into the SIAA, more than three decades after its passage, would defy the history of both the SIAA and of the 1960 amendments.

Lacking a sound basis in the statute, the government seeks to invent a constitutional basis for implying a discretionary function exemption. This argument proves too much; if the separation of powers doctrine by its own force could create an implied exception to every waiver of sovereign immunity, there would have been no need for Congress to provide an explicit exemption in the Federal Tort Claims Act. More importantly, however, the government's tenuous implied exemption argument misses the obvious point that this statute is neither ambiguous

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[1] For this reason alone, the issue raised by this case cannot be resolved on the basis of *United Continental Tuna, supra*. In that case, there was no provision excepting suits covered by the SIAA from the Public Vessels Act, and this Court emphasized: "Congress did nothing to alter the distinction between the Suits in Admiralty Act and the Public Vessels Act, or expand the one at the expense of the other." 425 U.S. at 179. Here, however, it is apparent that Congress chose to expand the SIAA at the expense of the Federal Tort Claims Act and explicitly eliminated any application of the latter statute. See 28 U.S.C. § 2680(d).

nor mute with respect to the liability of the United States. It is quite explicit: the United States is liable in the same circumstances as a private party. In the face of this explicit direction, at least, there is no room for implication.[2]

b. Given the lack of statutory and constitutional support for the government's reading of the SIAA, it is no surprise that its reading has provoked conflicting views in the courts of appeals. While several circuits have found a "discretionary function" exception in the SIAA, the Fourth Circuit has expressly rejected that reading. *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975).

The government contends that *Lane* has been ignored and eroded by later Fourth Circuit cases, particularly *Faust v. South Carolina State Highway Department*, 721 F.2d 934 (4th Cir. 1983). In support of this view, the government's brief states baldly that *Faust* "did not discuss the Fourth Circuit's prior decision in *Lane*" and asserts that *Faust*'s reasoning "is difficult to reconcile" with *Lane*. Br. Opp. at 14.

The government's assertions are not true. In fact, *Faust* discusses *Lane* with approval and relies on *Lane* in deciding that the government is not immune from suit under the SIAA:

> We do not doubt that if the United States, through the Coast Guard or the Corps of Engineers, breached some duty imposed by statute or the common law by failing to mark the cable adequately or to require its removal, plaintiffs would have a meritorious cause of action against it under the Suits in Admiralty Act (SIAA). *See* 46 U.S.C. § 742; *Lane v. United States*, 529 F.2d 175 (4th Cir. 1975) (Coast Guard's failure adequately to mark wreck is actionable under SIAA).

[2] It must be remembered what these cases are about. They raise such questions as whether the government should be held liable when it fails to mark maritime hazards, or fails to repair a weather buoy, or lets power lines sweep too low to the ground. These are classic negligence questions of a kind that courts address every day. To invoke separation of powers to protect these acts from judicial scrutiny is to trivialize constitutional doctrine.

Faust v. South Carolina State Highway Department, 721 F.2d at 937. In a related note, the *Faust* court explicitly reaffirms the holding in *Lane*:

> The SIAA permits suits in admiralty against the United States "In cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained. . . ." That is, it renders the United States liable to suit to the same extent that a private person would be liable. *Lane*, 529 F.2d at 179.

Id. at 937, n.2.

In short, the Fourth Circuit has held a single consistent position for more than a decade and is unlikely to change.[3] The issue, therefore, is one as to which there exists an ongoing, unresolved conflict, on which this Court's guidance is needed.

2. Even if a "discretionary function" exception applies to the SIAA, this case presents a second issue on which the circuits are divided: whether "discretionary functions" include decisions allocating government resources at an operational level. Here, the government does not argue that there is no conflict; it frankly admits that "there is a lack of unanimity among the courts of appeals regarding the scope of the discretionary function." Br. Opp. at 21. The government's arguments against grant-

[3] The government could claim a conflict between *Faust* and *Lane* only because it failed to note in this section of its brief what it emphasized elsewhere (*e.g.*, Br. Opp. at 23-24)—the fact that tort claims under the SIAA pose two questions. The first is whether the government is immune. The second is whether the government owes a duty of care to the plaintiff. In *Faust*, the Fourth Circuit relied on *Lane* to conclude that the government was not immune; only then did it reach the second issue and conclude that the government had no duty to the plaintiff.

The government made the same mistake in relying on *Magno v. Corros*, 630 F.2d 224 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981), Br. Opp. at 15, n.9, another case in which the court found the government not liable because of the lack of a duty. Again, the court's reasoning would tend to uphold *Lane*, rather than cast doubt upon its validity. The question of immunity is not addressed by the court.

ing certiorari boil down to three points: (1) there would not be a conflict if the lower courts properly understood this Court's decision in *Varig Airlines (United States v. S.A. Empresa de Viacao Aera Rio Grandense)*, 467 U.S. 797, 810 (1984)); (2) the facts of this case are different from those in which the conflict has arisen; and (3) the government has other defenses that will allow it to win this case even if it loses on the "discretionary function" issue. None of these arguments holds water.

a. The government's argument from *Varig Airlines* is largely irrelevant; if anything, it shows why Supreme Court review is necessary. For despite the sweeping interpretation of *Varig Airlines* advanced by the government both here and in the courts of appeals, the conflicts have, if anything, grown more pointed since that case was decided in 1984. In addition to the express conflict between this 1986 case and *Eklof Marine Corp. v. United States*, 762 F.2d 200 (2d Cir. 1985), the petition cited seven post-*Varig* decisions from four circuits, all of them limiting the "discretionary function" exemption to decisions grounded in social, economic, and political policy, Pet. at 11-13;[4] in reply, the government noted that "[o]ther courts have not recognized such a limitation," Br. Opp. at 21, and cited three post-*Varig* decisions from other circuits. Since *Varig Airlines*, then, at least nine circuits have ruled on the issues presented here, and they have split 5-4. If the government's reading of *Varig Airlines* were self-evident, it would hardly have sparked such discord.

The government's interpretation is in fact wrong. In *Varig Airlines*, this Court rejected an attempt to sue the government for negligent regulation of a regulated industry. *Varig Airlines* stands for the proposition that the government has wide discretion in deciding how to regulate private parties. This is not such a case. It has far more in common with *Indian Towing Co., Inc. v. United States*, 350 U.S. 61 (1955), and it is a measure of how

[4] Recently published cases continue to support this view. *See* Mandel v. United States, 793 F.2d 964, 967-68 (8th Cir. 1986).

radical a position the government now urges that it must repudiate Justice Frankfurter's opinion in *Indian Towing* as irrelevant to the question of what a discretionary function is. Even the First Circuit opinion that the government is defending here calls *Indian Towing* "the lead the case" on the discretionary function issue, Pet. App. A-5, as does the Fifth Circuit opinion that the government discusses at length in contending that the SIAA does not contain a "discretionary function" exemption. *Wiggins v. United States*, 799 F.2d 962, 966 (1986).[5]

b. The government also contends that this case does not present the issue whether the "discretionary function" exemption covers more than policy and planning decisions because determining the amount and quality of information necessary for accurate weather prediction is a policy decision.

This argument misses the point of this case. It was the government that determined what information would be necessary for weather prediction when it designed the system on which the fishermen relied in this case. It decided to use weather buoys and to place one off Georges Bank; and when the Georges Bank buoy failed, it was the government's decision to replace it. This case arose because the government in fact failed to repair the buoy, failed to replace it, and failed to let fishermen know that the Georges Bank forecasts had been compromised. The government has been held liable, in short, for failing to properly maintain the forecasting system that the government itself had designed and decided to maintain.

The government seeks to characterize this conduct as policymaking by raising its failure to repair the Georges Bank buoy to a higher level of abstraction. Rather than issuing forecasts on the basis of partial information, the

[5] See also *Wysinger v. United States*, 784 F.2d 1252, 1253 (5th Cir. 1986); *Drake Towing Company, Inc. v. United States*, 765 F.2d 1060, 1064 (11th Cir. 1985); *Eklof Marine Corp.*, 762 F.2d at 202; *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1090 (D.C. Cir. 1981); *Chute v. United States*, 610 F.2d 7, 13-14 (1st Cir. 1979). Indeed, this Court has cited *Indian Towing* as a leading case on discretionary function. See *Varig Airlines*, 104 S.Ct. at 2765.

government prefers to say that it was engaged in "selection of a standard for the issuance of weather predictions." Br. Opp. at 21. But semantics are not the key to whether a policy or planning decision has been made. As was made clear in the petition, courts adopting a narrow view of the "discretionary function" exception grant immunity only to decisions that involve "the weighing of public policy considerations." *Aslakson* v. *United States*, 790 F.2d 688, 693 (8th Cir. 1986). The decisions must be "grounded in social, economic and political policy." *Begay v. United States*, 768 F.2d 1059, 1064 (9th Cir. 1985). *See also Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986) ("Government decisions which do not involve discretion to make or implement policy, in contrast, may give rise to a tort claim, even if those decisions require the exercise of other forms of discretion.")

The results of the cases are equally emphatic. For example, the Second Circuit has allowed a suit to go forward on the theory that the Coast Guard should have deployed extra buoys to mark a hazard; it did not consider "selection of a standard" for identifying maritime hazards a discretionary function. *See Eklof Marine Corp. v. United States*, 762 F.2d 200 (2d Cir. 1985). Nor would the government have lost in the Eighth Circuit if "selection of a standard" for elevating power lines were considered a policy matter there. *See Aslakson v. United States*, 790 F.2d 688 (8th Cir. 1986).

The government's remaining efforts to distinguish this case from those cited by petitioners are even less compelling. The government distinguishes, in a footnote, the present case from *Eklof* and *Drake Towing*, *supra*.[6] It

[6] The government does not even speak to the other jurisdictions which are in conflict with the approach to the discretionary function taken by the First Circuit in this case. Aside from *Eklof* and *Drake Towing*, the Sixth Circuit in *Chotin Transportation, Inc. v. United States*, 784 F.2d 206 (6th Cir. 1986), *en banc pending*, and the Eighth Circuit in *Aslakson v. United States*, 790 F.2d 688 (8th Cir. 1986), limit the discretionary function to "planning or policy" determinations of the government.

notes that both *Eklof* and *Drake Towing* concerned the location and number of buoys necessary to mark a shipwreck, and says that in those cases the government's action created affirmative hazards as well as reliance on the part of the injured parties.

The distinction does not strengthen the government's hand. If anything, *Eklof* and *Drake* involved more discretion; there, the courts were asked to second-guess the Coast Guard's decision about how many buoys should be placed around a wreck, and where. In this case, the number and placement of weather reporting buoys is not at issue; the government itself decided to place and maintain a buoy off Georges Bank. All that is at issue is the government's failure to repair or replace the buoy it had decided was necessary.[7]

c. The government's last argument is that it could win this case on other grounds. It points to language in the Eighth Circuit's opinion expressing reservations about the district court's holding that the government had a duty of care to these fishermen. It also alludes to other possible defenses that "the court of appeals did not squarely address." Br. Opp. at 24.

The government does not contend that the decision below rests on two independent grounds, so that review of one issue in this Court will produce no change in the status of the case. The First Circuit rested its decision firmly and entirely on an implied "discretionary function" exemption in the SIAA. To be sure, the government has other defenses; and the plaintiffs would welcome an opportunity to discuss their weaknesses at length.[8] But

[7] We find simply puzzling the government's suggestion that a wreck is an affirmative hazard but a storm is not, or that the reliance element is stronger if boaters rely on an inert buoy rather than a weather forecast.

[8] The ineluctability of a government victory is hardly demonstrated on a record in which the only court to "squarely address" the government's other defenses—the district court—rejected every one.

it is hard to imagine a less appropriate place than a certiorari petition to argue the merits of alternative grounds not reached by the court of appeals.

* * * *

The government seeks to characterize the issue in this case as whether the government can be sued for a mistake in predicting the weather. That is not the focus of this petition. This petition presents a threshold question about whether the discretionary function exemption is available at all under the Suits in Admiralty Act. It further raises a fundamental question about the scope of the discretionary function exemption in the nonregulatory context—whether a government agency which has designed a system and induced public reliance upon it may claim immunity from suit for deaths caused by a failure to maintain that system properly. These issues have deeply divided the courts of appeals and have implications for a broad range of federal agencies.

The petition for certiorari should be granted.

Respectfully submitted,

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OPINION

EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

HONOUR BROWN, ETC., ET AL. *v.* UNITED STATES;
SEA FEVER CORPORATION *v.* UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 86-528 AND 86-202. Decided January 20, 1987

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

These cases present the question of whether the discretionary function exception to liability under the Federal Tort Claims Act, 28 U. S. C. §2680(a), encompasses governmental decisions involving allocation of resources. The Court of Appeals in these cases held that such decisions are covered by the discretionary function exception. 790 F. 2d, at 202. Other courts of appeals have rejected this view. See *Eklof Marine Corp.* v. *United States*, 762 F. 2d 200, 204 (CA2 1985). See also *Aslakson* v. *United States*, 790 F. 2d 688, 693 (CA8 1986). I would grant one of these petitions to resolve the conflict.